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RECONSTRUCTION.

The Duty of the Profession to the Times.[1]

"I pass from the consideration of the *means* by which a lawyer may hope to accomplish the work intrusted to him, to what that work is to be.

And here it is, that the character of the epoch at which we live assumes the importance to which I alluded in the opening of these remarks. We are living at a most eventful period, whether we consider our relations to it as citizens, or as members of the legal profession. In the present condition of affairs, we have no right to expect the accustomed amount of professional business, when the whole attention of the nation is directed to the prosecution of a war of such tremendous proportions. The ordinary course of business is arrested or diverted. Negotiations in reference to the future are no longer governed by any well settled rules. Trade no longer flows in its accustomed channels. The character of the currency is fluctuating and uncertain, and beyond supplying the more pressing demands of the war, no new sources of employment, either of labor or capital, are offering themselves to the skill or enterprise of the citizen. Contracts are, moreover, chiefly made in reference to prompt and immediate payment, so that few opportunities are afforded for the ordinary business of the profession. Nor is it any longer a mere theoretic apothegm that "inter arma silent leges." Nor have we any right to expect any special change in this respect, so long as the war con-

[1] Extract from the Closing Lecture to Harvard Law School, July, 1864. By the Bussey Professor.

tinues. Shoddy contractors may continue to grow rich, and gold-brokers may still count up their gambling gains by millions, while the staid and sober man of the law must wait till a return of peace shall bring with it the blessings of lawsuits, with the consciousness of the citizen that his rights are really protected by the law, and the voice of Justice is again heard in the land, instead of that of the Provost Marshal.

That such a state of things is to return, I most confidently expect. Nor is it to be reached except after a long and difficult struggle, in which the profession must take a most important and leading part. You have only to wait a brief time, when the business of reorganization must be resumed; and the people will look to the aid and counsel of others than the mad or selfish politicians, whose evil counsels or rash judgments first involved them in the disastrous consequences of alienated affections and civil discord. Such a violence has been done to our institutions, such a strain has been made upon the strength of the common bond that bound us together as a nation, that it will require the wisest counsel, the calmest judgment, and the most devoted patriotism to restore the government again to any thing like harmonious action. And these, I repeat, are not to be found in the political leaders who caused the mischief to begin with. Nor is it to the mere man of business that we are to look, nor to the scholar, or man of letters, however speculative he may have shown himself in his study into causes which lie hid beyond the reach of his unpractised vision. In the restoration of peace to our distracted country under the dominion of well administered law, such as she had enjoyed for three quarters of a century, I am sure that our profession are to take a most important part. In one respect this cannot fail to be the case. In the general wreck and ruin, in some parts of our country, which civil war always brings with it, the old lines of demarcation which limited and defined the rights of property, the sanctity of personal security, as well as the accustomed and traditional respect for law, have been all but extinct. These are to be restored by the direct agency of the courts, and the influence and instrumentality of the officers of justice, including the practitioners at the bar. To do this will necessarily involve the multiplication of suits, and consequently call into play the services of such of the profession as shall be then ready to contribute learning, skill, and fidelity to the work. I have no doubt an abundant harvest of professional gains will be open to men of competent skill and ability, who shall be ready to come in as laborers in a field which is to be as broad

as our whole vast country. Let no man, therefore, lose heart, and cease to prepare himself, by assiduous attention to study and preparation, because he sees no immediate call for his services, and the rewards to which he is to look forward are seemingly problematical and remote. The time will come when the utmost of your skill and learning will be needed; when, from the humblest attorney in the country village, to the first jurist in the land, every one will be called upon to contribute something towards adjusting this wonderful machine of popular government, under which the citizen is safe, while the nation is prosperous and at peace.

Regarded simply in the light of prospective professional success, the encouragement to effort on your part, in the coming restoration of our divided nation, is strong, even to confident assurance.

But our subject does not stop here; it has other bearings in comparison with which the question of individual success sinks into insignificance. Everybody is pausing, and wondering how this divided, broken empire is to be again reintegrated; how popular action is to restore what popular frenzy has sought to destroy, and how the passions of civil war pervading such masses can ever be reduced to the calm and orderly restraint of government. We find the nation in a condition which was never contemplated by the framers of our government, and, consequently, never provided for, in terms, either in the Constitution or the laws.

It is not surprising, therefore, that in such an emergency, even the fundamental law of the land should become the subject of conflict and debate. The very standard and text which the fathers devised to guide posterity in questions of doubtful import, has itself been made the theme of speculation and grave controversy. One adopts one line of construction, and another a different one, till those who borrow their opinions from the so-called statesmen in our country, are at a loss as to what is the true meaning of the Constitution to which we refer as the framework of our government.

Where, then, are we to go, and what are we to hope for in times so perilous, and amidst counsels so distracting? I repeat there must be somebody to put this matter right, and that we have little to hope from the mere politicians of the land. Their interests and conflicting opinions must stand seriously in the way of that harmony of thought or action which is essential to success in such an undertaking. Nor have we more to hope for from the men of action and business who are intent upon

the purposes of gain, or are limited and confined to the duties of private life. They may be honest in their aims, and devoted in their zeal for the country; but the science of government is too broad, as well as too complicated, to be mastered by mere instinct, or personal wishes, however patriotic.

What, then, is to be done, and who is to take the lead in measures so momentous to our country, and her future well-being? I can best answer this inquiry by going back for a moment to what may be called the first principles of our government. It is in theory a popular one. *Prima facie*, the opinion of one man is just as potent, and theoretically as wise as that of his neighbor, and the fountain and source of popular sovereignty is in the predominating aggregates of this sentiment and opinion. The instrumentality through which it acts are the various functionaries of government which are provided for and prescribed in a framework voluntarily adopted, originally, by a popular vote. Now the great difference between this and a despotism is, that the will which directs the affairs of the state is centred in one man. The Czar of Russia forms in his own mind a judgment of what new rule or measure the people of the empire need, and he promulgates it as his own. He does the thinking as well as the ordering, while his subjects are content to obey without presuming to set up their judgment against his. On the other hand, to the extent to which the power of government is exercised under our fundamental law, it may be as absolute and as irresistible as that of despotism itself; but the thought and will that thus manifest themselves are made up of aggregates, larger or smaller, of individual thoughts and wills, in which, in theory, there is no individual preponderance or control. If, for instance, there were an irresponsible despot at the head of our affairs, we could readily see that it would not be difficult to bring this controversy in which we are engaged to a close, and to adopt and adjust compromises, or prosecute the war in such a manner as to result in peace. But when it becomes necessary to consult the views and opinions of several millions of minds, the possibility of such an unanimity of sentiment as to lead in any one course of policy, looks, at first thought, like a hopeless undertaking.

But when we come to scan the matter in the light of past experience, as well as the practical working of the thing, half the difficulties which seem to stand in the way, disappear. Our country went through an experiment as doubtful, and, to all human calculation, as difficult as that through which it has got to pass to see the Union restored, and the functions of

government in harmonious action again. We know from history what a chaotic state the nation was in after the Peace of '83, till our Constitution of '88. Before the parts of this broken republic could come together, individuals had to yield favorite theories, sections to give up cherished prejudices, and self-interests be sacrificed to the good of a whole. Yet all this was accomplished, and a constitution of government was adopted by, mediately, a popular vote. Now does anybody suppose that the great body of the voters of the country had each of them, calmly and dispassionately, set down and examined for themselves the advantages and disadvantages of the system they thus adopted in detail? Why, the men who planned that constitution, and fitted its parts so admirably together, were exceedingly few. One might almost count upon his fingers every one who took the leading initiatory measures for devising the framework of our government; and when they had done this, what would have been its fate if it had not been for the writings, and personal influence upon others, of such men as Hamilton, and Madison, and Jay in the national council, and some half-dozen leading minds in the several State conventions, by which it was finally adopted. It was they that furnished the element of the thought which the people adopted as their own, and acted upon accordingly. The truth is, with all our boasted freedom of thought, and equality of civil rights and civil power, the thinking of the country is done by a very few, compared with the whole mass; while it is equally true that the governing power in the nation is in the play and exercise of thought, however it is originated. Nor is it to be forgotten what means are now within the command of every one for reaching the public mind, and the popular heart. A man of intellectual power, with the press, the post-office, and the telegraph all within his reach, stands, as it were, at the very centre of a moral universe, from which he can, at his pleasure, touch every part of the circle around him, with a wand of power. And while such an instrument and means of operation are furnished at his hand, the field for its exercise is the entire nation. It is idle to suppose that if the loyal States succeed, as they are confident of doing, in putting down this rebellion, that the affairs of State are to settle down into order, and resume their accustomed course and current, of their own accord. Whoever expects this forgets the strain and violence which every part of the government has received in a war of such an unprecedented character and magnitude. New compromises, new limitations, new restraints, and, in many things,

a new policy are to be devised, and the process of reconstruction, and restoration of government to its proper functions again, is to be effected gradually, and by conforming to the altered condition of things.

That this can be, nay, more, that it will be done, we have every reason in the history of the past to hope and believe. To accomplish it, may require great and marked changes in public sentiment and feeling; but who can look upon the brief period of three years just past, and say that even a greater change than would be required for this, may not be effected? Who now thinks, or feels, or believes upon some subjects as he did before this war begun? The country has been constantly in a transition state of mind.

Now what is wanting to prepare the country to adopt and sustain the requisite changes in the details of governmental policy is, that there should be a pervading sentiment in favor of whatever these may be. I do not propose, even if I had time to do so, to examine and inquire what these changes should be; I assume that some changes must be made, and my only object is to see how this may be peacefully done.

One thing, at least, is clear. It cannot be done by men coming together and authoritatively settling these questions. The multiplication of such congresses as we have had at times, of late, would be anything but a blessing to the country. In the next place, not one man in a thousand is competent to originate any great practical scheme of government; if he does, the masses of the people are too busy in their own affairs, too unaccustomed to weigh and examine new theories and complicated problems of policy, to understand and apply any such scheme, if it were laid before them. As I said before, the people do not do their own thinking in matters as abstract and intangible as measures of State policy; they reach their conclusions indirectly, and second-handed. They come to conclusions at last, and act upon their convictions, and the country is really governed by the force of this popular judgment and will. But we must look deeper than a vote at the ballot-box, for the spring that moves this great political engine.

You are ready now, I presume, to understand what I ought perhaps to have said with less circumlocution, when I say that I look to our own profession in the country, more than to any other class of men, to take the lead in the great moral and political revolution through which the nation is to pass before it settles down into quietness and peace. In the first place, their studies direct their attention to questions of this

kind. In the next, they are, from training and habit, prepared to weigh and examine propositions, and not to be misled by merely plausible theories and first impressions. They have to act as judges in almost every professional opinion they form, and in that way to look at both sides of questions; and in addition to all this, they are trained to impress upon others the judgments and opinions they form for themselves. And there is, moreover, so much of identity in the conclusions to which well-trained minds come upon any given question submitted to them, that we may reasonably assume that there will be scattered all through the land a body of men who not only can and will think for themselves, but will make their own convictions tell upon the opinions of others.

Now, then, I have reached what I have been aiming at ever since I begun these remarks. You are about to join that body of thinking, active minds; you cannot, if you would, with your cultivated habits of studying into the affairs of the day, help forming some opinion, nor can you fail of impressing that upon somebody else. Nor is the extent to which this may be done easily to be measured, if you will but feel and act as if you were in no small degree responsible for the opinions of those around you. What I want to impress upon you, as you go out from here, to enter upon your several spheres of usefulness and duty, is that you owe it to your country, to psoterity and the world, that you qualify yourselves to think, and judge, and discriminate, and that you give to others the results of your own honest sentiments and convictions.

Let no one say he is too little known, too unimportant from age, want of experience, and want of personal influence, to be the subject of such an appeal. You do yourselves, and the world around you, injustice. Do you think the problem of government, in which the whole people are expected to take a part, is more difficult to comprehend, or more difficult to explain to others, than the complicated, often arbitrary, and always more or less abstract system of rules as to property, and personal rights and remedies, which we call the Law, and which you have been pursuing here with so much diligence and success? I care not who he may be, nor where he may settle, there is not one who has had the benefit of your training, who not only can, but will make himself felt in the opinions of others. It does not require that you should be members of Congress, or judges of courts, or leaders of the bar, to do this. Some fill wider spheres than others, but every man has a sphere, and wherever yours may be, you can, if you will, do

something for your country in this her day of trial and tribulation. I do not tell you what your opinions shall be; that I leave to your honesty and your patriotism; but as a last appeal to such of you as are going out from these halls, to enter upon a career that is opening before you, I have a right to speak for a country that has done so much for us, and the whole family of man, as our own.

It is, moreover, for yourselves and your generation that I am speaking. The generation that I belong to have had our share in the blessings of a good government, and we are to live principally in the past; but for you, life is just opening. Your future is your all. You are to be the architects of your own fortune and success. There is no power outside of that people, of which you are to form a part, who will watch over and take care of your interests; that is for yourselves to do. We who have seen something more of the drama of life than you have, can tell you something of what that life is; but, after all, you are to be the actors, and time only can disclose in what scenes you are to play your several parts.

I cannot doubt you will act those parts well, whatever they may be; nor can I doubt that the country—your country—as she looks to you for council and support, will find you as true to her as you have hitherto been to yourselves, and the cause of duty. That country, let me add, is in trouble, and can only look to her sons for relief and support. The struggle in which she is engaged is the battle of the ages, and its result is to tell on the destiny of the world for unknown time. Some of you have already fought in her battles; and if, as we fondly believe, she is to come out of this fiery trial in her unbroken integrity, there will not be one who shall have fought, or thought, or pleaded for her, who may not glory in the consciousness that he has done something for the great cause of human liberty, for which the best and bravest men have been willing to offer up their lives, as not too costly a sacrifice."

RECENT AMERICAN DECISIONS.

Circuit Court of the United States.

Eastern District of Pennsylvania.—In Equity.

JAMES *v.* BLAUVELT & FREDERICKS.

A seller of unimproved land, in order to obtain an expected profit of nearly twice its value, conveyed it in fee, with a stipulation that he would, by certain instalments, advance more than four times its value towards the cost of stipulated improvements; and received, when he conveyed it, mortgages of it securing a sum composed of its value as unimproved, the stipulated amounts of his advances, and the amount of his intended profit. This was done under an arrangement that the purchaser should not become a debtor for any of these amounts. The seller therefore made the conveyance to an irresponsible middleman, who executed the mortgages and the bonds which they secured, and the stipulation to improve the land; and thereupon conveyed it, while still unimproved, for a nominal consideration, to the party who had, from the first, been the intended purchaser, describing it as subject to the mortgages. The stipulated improvements having been completed, the value of the land, as enhanced by them, exceeded greatly the whole amount secured by the mortgages.

A double stamp duty was not incurred by the duplication of the original conveyance.

The conveyance from the middleman required no stamp, the consideration or value not exceeding one hundred dollars.

The conveyance to him should have been stamped under an assessment of the duty, not upon any prospective enhancement of the value of the land by the stipulated improvements, nor upon the value of it as unimproved at the date of the conveyance, nor upon the expected profit, but upon the *consideration* estimated as the whole amount of the return secured by the mortgages to the seller, not deducting his advances.

In the act of 1st July, 1862, ch. 119, the clause imposing stamp duties upon conveyances makes the duties assessable in respect of the *consideration* or *value*. No stamp is required, unless the consideration or value exceeds one hundred dollars. (12 Ll. U. S. 481, 482.)

Tatlow Jackson, on the 13th April, 1863, received a conveyance of unimproved land in Philadelphia, which was afterwards divided into 240 building lots. The whole consideration of the conveyance to him was reserved in ground rents, extinguishable on the payment of amounts, in the aggregate,

$65,000. On 11th May, 1863, Jackson conveyed the whole of the land to the respondent, Fredericks, in fee, by a deed containing a covenant of Jackson to discharge all accruing ground rent, and extinguish the ground rents on or before 1st July, 1864. Fredericks executed 240 bonds of the same date with the conveyance to him, each bond conditioned for the payment by him to Jackson of $2,000, at a certain time, with interest half-yearly; and, on the same day, executed 240 mortgage deeds, each conveying one of the lots to Jackson in mortgage, to secure one of the bonds. By an agreement between these parties, of the same date, Fredericks engaged to build, within a limited period, upon each lot, a house of a certain value, greater than the mortgage debt charged upon it; and Jackson engaged to advance to Fredericks, towards the cost of each building, $1,200, in the whole, $288,000, payable by instalments at certain stages of the progress of its construction. The extinguishment money, $65,000, which Mr. Jackson was to pay, was the whole value of the unimproved land. On his pecuniary advances, $288,000, his premium, secured by the mortgages, was to be $127,000. The three amounts, together $480,000, were the gross aggregate of the mortgage debts. By a deed of 13th May, 1863, Fredericks, who was an irresponsible person, conveyed to the complainant in fee, for the nominal consideration of one dollar, the 240 lots, described as each subject to a mortgage for $2,000. A house having been built upon one of them, and the ground rent upon it extinguished, the respondent, Blauvelt, on 1st March, 1864, by a written agreement, purchased it for $4,500, from the complainant, who now sues to compel a specific execution of this agreement. Mr. Blauvelt makes no other objection to completing his purchase, than that the conveyances from Jackson to Fredericks, and from Fredericks to the complainant, were not duly stamped.

According to the phraseology of the writings, $800, which was the excess of each mortgage debt above the stipulated amount of Mr. Jackson's advances towards the cost of each building, was the consideration receivable by him for the conveyance of each lot. This, on the 240 lots, was $192,000. The stamp duty, under the Act of Congress, if assessable in respect of a consideration of this amount, would have been $380. Stamps to the value of $380 were affixed to the conveyance from Jackson to Fredericks. On the conveyance from Fredericks to the complainant, there was no stamp. The complainant insisted that this deed required none, and that the

former deed was duly, if not too highly, stamped; but submitted the questions to the court's decision, offering to put such stamps, if any, upon both deeds, or upon either of them, as might be requirable, in order to make the title unobjectionable.

The court directed that notice of the pendency of the suit should be given to the Attorney of the United States for this district. He was present at the hearing.

The case was argued before Judge CADWALADER, holding the Circuit Court.

Mr. Price, for the complainant; *Mr. Drayton*, for the respondent, Blauvelt.

Present, *Mr. Gilpin*, the Attorney for the United States.

CADWALADER J.—Formerly, in the case of an agreement between the owner of an unimproved suburban lot of ground and an intended purchaser, that the latter party should, within a limited time, build upon the lot a house of a certain value, and that the seller should, by instalments, at certain stages of its construction, advance, towards its cost, a part of its intended value, the course of business in this neighborhood was to postpone executing the conveyance until the house was duly finished. The gross amount receivable by the seller, including his pecuniary advances, with interest, was often secured at the same time, by a mortgage to him of the house and lot conveyed. In order to avoid inconveniences from statutory liens for work and materials, another method of carrying the purposes of the parties into effect, has been substituted. The conveyance of the lot is now made before the building is begun. The mortgage to secure the gross returns is executed at the same time. A cotemporaneous agreement, containing the mutual executory engagements, operates as a deed leading or declaring those intents and uses of the conveyance and mortgage, which do not appear on their face. The purposes to be carried into effect are, under this modern method of conveyancing, precisely the same as they were under the former method.

Under these arrangements, the hazard that the purchasers would prove to have been parties of slender means and imperfect integrity, was, of course, proportional to the premiums receivable by the sellers on their pecuniary advances towards the cost of the buildings. The failure of such speculations was notoriously frequent. This made the better class of builders unwilling to engage in them without an exemption from personal responsibility for the mortgage debts. A third method of conveyancing, which is not unobjectionable, was therefore adopted in some such cases. According to this method, the unimproved

lot is conveyed, in the first instance, to an irresponsible middleman, such as the defendant, Fredericks. He executes the bond and mortgage, and sometimes, also, as was done here, executes, as a party, the agreement which ascertains the practical uses and purposes of the conveyance and mortgage, ostensibly as if it were intended that he should retain the proprietorship, and build the house. This done, he conveys the unimproved lot, subject to the mortgage, for a nominal consideration, to the party who has, from the first, like the complainant in this case, been the intended purchaser. With reference to certain judicial decisions in Pennsylvania, great caution is required in so penning the deed which conveys the lot as to exclude the implication of an engagement on the part of such actual purchaser to discharge the mortgage debt.

One of the questions in this case was, whether a double stamp duty had been incurred through this duplication of what was in effect a single conveyance. The parties to such a fiction could not reasonably have complained if this had been the legal consequence. If an action at the suit of the United States had been brought, in order to test the question, I would probably have directed the case to stand over until the determination of such collateral suit. But none has been brought; and, upon reflection, I think that the double duty would not be recoverable.

The conveyance from Fredericks to the complainant, separately considered, required no stamp. If, with reference to the entire transaction, the full amount of stamp duty was not paid, the whole deficiency should be assessed upon the conveyance from Jackson to Fredericks. As to this deed, the decision should be the same as it would have been if the conveyance had been a direct one from Jackson to the complainant, without the interposition of Fredericks.

If every house and lot of the two hundred and forty had been worth as much as the price for which the defendant, Blauvelt, has purchased one of them, the whole value, when all the houses were finished, would have been $1,080,000. There is no necessity to inquire precisely what may be the whole actual value of all of them, as it is thus enhanced by the improvements. If the execution of the conveyance had, according to the former course of business, been postponed until after the houses were built, a question whether the stamp duty should have been assessed upon such enhanced value, or upon the consideration of the conveyance, might, perhaps, have arisen, But such a question cannot arise under the modern method. which has been adopted in this case, of conveying the lots while

unimproved. A prospective, as distinguished from an existing value of the subject of a conveyance, cannot be regarded in making the assessment under the Act of Congress. This remark applies, without exception, to conveyances of land, of which the value is, under existing stipulations, to be enhanced by future buildings or other improvements, however unqualified the stipulations may be.

But such prospective enhancement of the value of the subject of a conveyance, must not be confounded with an excess of its consideration beyond the present value of the subject. In this case, the value of the unimproved lots, when conveyed, was only $65,000. But the consideration, by whatever standard measurable, was of much greater amount. According to the import of the Act of Congress, the assessment of the stamp duty is to be made in respect of the *consideration* or *value*. When the present value of the subject is *less* than the conventional or actual amount of the consideration, the stamp duty must be assessable on the *consideration*, without any reference to value. Parties may be so bound conventionally by their own language in a conveyance, that when the consideration expressed in it is *greater* than the actual consideration, and *greater* than any value of the subject, the stamp duty will, under this act, be assessable as if the actual consideration were that expressed. No such case is here in question. The dispute is, whether the amount of the consideration, as conventionally estimated by the parties, was not *less* than the actual amount. If thus less, the duty should have been assessed on the *actual* consideration, without reference to the language of the writings. The facts are undisputed. The only question is by what standard the actual consideration should have been measured. The proper measure was the same as it would have been if the conveyance had been postponed until after the houses were finished. In a case of such postponement, the consideration would not be enhanced, because the enhancement of the value of the subject, when conveyed, would be actual instead of prospective. Nor was the consideration of the conveyance, which in fact was made before the lots were improved, less in amount because the stipulated enhancement of their value was, at its date, prospective only.

The conveyance, which simply executes a contract of sale or exchange, is a mere transfer of property. The consideration of other contracts, executory or executed, may be merely that which induces the consent of a party. But the consideration of sales or exchanges includes whatever else may be receivable

in return for their subjects. Here consideration must not be confounded with profit. A consideration of great value may be receivable without the receipt of any profit. When, as in the present case, a seller is to get a profit, the *beneficial* return is compounded of the cost of the subject and of the profit. There may, however, be a gross return to him, which includes an addition to such beneficial return. This addition, though not profitable, but the reverse, may nevertheless be part of the consideration. Mr. Jackson, that he might get a profit of $127,000, conveyed these lots when worth $65,000, with a stipulation that he would advance $288,000 towards the cost of the stipulated improvements, and received, at the same time, the mortgage security for a return of the three amounts, together, $480,000. The *beneficial* return to him, composed of the first and second amounts only, was $192,000. The *gross* return was the whole $480,000. The question is, whether stamp duty is assessable on the beneficial, or on the gross return.

If the word *value* in the Act of Congress, could be understood as meaning *value of the consideration*, the assessment might properly be made upon the beneficial return alone. But the words *consideration* or *value*, as used in the act, have no such import. Their application cannot be such that the word *value* qualifies the word *consideration*. The *consideration* is to be understood as that of the *conveyance*, the *value* as that of the *subject* of conveyance. The question depends, therefore, upon the unqualified import of the phrase *consideration of a conveyance*.

When moneys advanced, or to be advanced, by a seller, towards the cost of improving the subject of sale, are a part of the gross return, it might, at first view, seem reasonable to deduct them, as was done by the parties in this case, and estimate the consideration as the difference. But the consideration is not thus measured in conveyancing. In the language of conveyancing, the gross return is understood as the consideration. The question, without being changed in substance, may be simplified in form, by supposing that the execution of this conveyance had been postponed until after the houses were finished, and the ground rent was extinguished, the advances having, in the meantime, been made by Mr. Jackson, and that he had received, at the date of the conveyance, a single mortgage, securing the whole $480,000. In the ordinary phraseology of such a mortgage, the land mortgaged would be described as the same which had, by deed of the same date, been conveyed to the party mortgaging it for the *consideration* which the mortgage

secured. Such phraseology is not without legal importance. In most, if not in all, of the States of this country, there are, as in England, known distinctions between a mortgage for the consideration of a conveyance and other mortgages. Under the recording acts of Pennsylvania, mortgages of land generally have priority only from the time of recording them; but a mortgage for the purchase money of the land mortgaged, if recorded at any time within sixty days from its execution, retains its priority against other mortgages recorded in the meantime. In this, and in other respects, the mortgages to Mr. Jackson were for the purchase money of the land, or, in preciser language, for the consideration of the conveyance. They were so to their whole amount of $480,000. As to the $288,000 advanced by him, their incidents at law, and in equity, were not, in any respect, less those of mortgages for the *consideration* than as to the 65,000 which extinguished the ground rents, or as to the premium of $127,000, which was to be his profit.

The consideration of his conveyance was therefore not less than $480,000. The stamp duty which should have been paid, was $940. Of this, $380 has been paid. The complainant, bv affixing stamps of the additional value of $560, may make his title unexceptionable. When they shall have been affixed, a specific execution of the purchase will be decreed, if the complainant, acquiescing in this opinion, shall ask such a decree.

I had great doubt, at first, upon the question of the amount of consideration. The doubt no longer exists. But I regret that the circuit judge was not present at the argument. After the intimation of my opinion that the $560 is due, an action to recover it will doubtless be brought at the suit of the United States, if it should remain unpaid. If the complainant prefers that the question should be decided in such an action, and the trial of it can be expedited, the present cause may stand over to await the result. If the trial of such an action cannot be sufficiently expedited, and the complainant's counsel wishes this case argued before both judges, it may stand over for a re-argument.

The complainant acquiesced in the foregoing opinion, and affixed additional stamps of the value of $560 to the deed; whereupon, a specific execution of the purchase was decreed; and it was ordered that he should pay all costs.

United States District Court.

Southern District, New York.—June 16.

BEFORE JUDGE SHIPMAN.

Liabilities of Common Carriers.

JOHN H. CHUBB ET AL. *v.* ABOUT 7,800 BUSHELS OF OATS. L. RENAUD, Claimant.

SHIPMAN J.—This suit *in rem.* is instituted to recover freight, at eight cents per New York bushel, on 7,800 bushels of oats, transported on the libellant's boat Mary Eva, from St. Antoine, Canada East, to New York, on account of Louis Renaud, of Montreal. A larger quantity of oats was shipped, as appears by the bill of lading, and not denied; but the excess over 7,800, New York bushels, was lost overboard during a heavy blow on Lake Champlain. The libellants now seek to recover freight on the quantity actually delivered, and also demurrage for detention of their boat in New York, in consequence of the failure of the clamant's agents to discharge her in proper time.

The bill of lading was, so far as any question before the court is concerned, in the usual form. The contract was to carry, and deliver in good order, "the dangers of navigation excepted." I think the proofs establish the fact, that the loss did occur from the dangers of navigation, and is therefore within the exception of the bill of lading, and it would follow that the libellants are entitled to recover their freight money on the quantity delivered, if there were no other question in the case. But the claimant resists this claim, and insists that the value of the oats lost should be first deducted, on the ground that they were stowed on deck in violation of the contract contained in the bill of lading, and that this departure from the contract was the occasion of the loss. The claimant also resists the demand for demurrage.

The bill of lading, under which the oats were shipped, was what is well known in law as a clean bill. It is well settled that the general usage and custom in the transportation of goods by water, to stow them under deck, annexes to such a contract the condition as the general rule that they shall be so carried. If they are carried on deck, it is deemed a violation of the con-

tract; and a loss occasioned thereby, although immediately produced by perils of the sea, falls upon the carrier. (*The Waldo*, Davies's Rep. 166; *The Peytona*, 2 Curtis's C. C. Rep. 21; *The Paragon*, Ware, 322.) This is the rule which prevails wherever the maritime law is administered. The carrier can, of course, exempt himself from this liability by obtaining the express consent of the shipper. No express consent of the shipper has been proved in the present case. It is, however, insisted that a custom of this particular trade, to stow goods of this description on deck, has been clearly proved; and that the legal effect of this local custom is to relieve this contract from the operation of the general rule. The evidence in support of this custom is objected to by the claimant, on the ground that proof of such a usage is inadmissible to vary the well-known legal import of this contract. This is an important question, and demands an attentive consideration.

In deciding this question, it must not be forgotten that this obligation of the master to stow the cargo under deck, does not rest upon any express provision in the bill of lading. That is usually silent on the subject. Neither is the obligation founded upon any legal construction of the terms of the instrument. It is an implication of law drawn from a well-known and general commercial usage or custom. The parties, where they enter into a contract of this character, are understood to recognize the usage, and to include its conditions in the unwritten terms of their agreement. Though the bill of lading is silent on the subject of the place of stowage of the articles named in it, whether in the hold or on deck, the eye of the law reads in every such bill the stipulation that they are to be stowed in the former. The obligation rests on the usage or custom of the maritime world, to which the shipper and carrier are presumed to be consenting parties, and which the law attaches to the instrument itself, where it is silent on the subject. This silence is a recognition of the usage and the rule founded upon it, and binds the parties as firmly as an express and formal stipulation. (*The Peytona*, 2 Curtis C. C. R. 23; *The Waldo*, Davies's R. 166; *The Paragon*, Ware's R. 324, 325; *Vernard* v. *Hudson*, 3 Sumner R. 406.)

The question then is presented—Can that part of the legal import of the bill of lading, which is implied by law from the general custom, be varied by proof of the custom of a particular trade, and thus withdraw the contract from the operation of the general rule requiring the cargo to be carried under deck? On this question, the case of the *Paragon*, above cited, is an au-

thority in point. In that case, Judge Ware says: "It is not denied that such a custom may exist in a particular trade, as well as authorize the master to carry a part of his cargo on deck, without subjecting himself to responsibility for its loss, or any damage it may sustain from dangers of the seas, in being thus exposed." He also adds, after referring to the French *Ordinance de la Marine*, "In our law, the rule requiring the cargo to be safely stowed under deck, does not stand upon any express text of any act of the Legislature, but upon the authority of general usage and custom. A rule of law that is established by custom may be repealed, or restrained by custom." On the nature of the proofs which should be required to establish a special custom of a particular trade, in conflict with the general rule of the maritime law, the same learned judge remarks: "But the general rule being founded on the custom of the country, universally known, and having the force of a general law, he who would exempt himself from its obligation, by a special local custom, is bound to prove the local custom by clear and conclusive evidence. Because the legal presumption is, that every contract is entered into with the understanding and intention of the parties that their rights under it are governed and determined by the general law. A local custom, in order to be binding on the parties and withdraw their contracts from the application of the common law, must be so generally known and understood, that it may fairly be presumed that all persons engaging in that particular trade are acquainted with it, and assenting to it. The presumption, then, will be that they form their engagements with a silent reference to the custom. And the custom, to be obligatory, must not be a loose practice, but precise, definite and certain, so as to supply the place of the general law in the given case, and be capable of being applied to the contract, and defining and fixing the rights of the parties under it. Such a custom, where it is established, and so generally known and recognized that the parties are presumed in their engagements tacitly to refer to it, applies itself to the contract, and forms, as it were, the complement to the terms in which the obligation is expressed by the parties, and, within its proper sphere, is equally binding with the general law." I have cited at length from this opinion, in the case of *The Paragon*, not because it is an isolated authority, but for the reason that it states the law on this point with singular clearness and accuracy. Judicial decisions to the same effect are abundant. It was well remarked by Hosmer C. J., in *Bruce* v. *Barber* (4 Conn. R. 13), that the doctrine is "trite

and familiar," that "a commercial usage, having existed a sufficient length of time to have become generally known, and to warrant a presumption that contracts are made with reference to it, is evidence of the intention of the parties, and illustrative of their agreement." Nearly the same language is held by the court in New York in *Smith* v. *Wright* (1 Caines, 43). In both of these cases, the question was one of liability for loss of goods stowed on deck. The general doctrine of the admissibility of parol evidence to prove the existence of usage or custom to vary the effect of contracts, is now well settled, both in the English and American courts, and has been repeatedly applied to the contract contained in a clean bill of lading. (Conkling's Admiralty, vol. i. p. 233, and cases there cited.) It is true that Mr. Justice STORY, in the case of the schooner *Riesicle* (2 Sumner), makes some trenchant remarks on the subject, but they are levelled at the abuse, rather than the existence of the doctrine. He concedes the principle, but energetically protests against extending it, so as to embrace "loose and inconclusive usages and customs."

But it is objected that the admission of parol evidence to prove the existence of the custom, where the contract of lading is in writing, contravenes the well-known rule that such evidence is not to be received to vary the terms of the written instrument. But evidence of usage or custom is never deemed within this rule. (*Renner* v. *The Bank of Columbia*, 9 Wheat. 581; 1 Smith's Leading Cases, 5th Am. Ed. 682; 1 Greenlf. Ev. § 292.)

The case of *Creery* v. *Holly* (14 Wend. 25), is relied on, as sustaining the objection to this evidence. But in that case the question arose not on objection to evidence of a custom, but to evidence of a parol agreement, that the goods might be carried on, instead of under, deck.

The opinion of the court is expressed in the following terms: "It is true that nothing is said in the bill as to the manner of stowing away the goods—whether on or under the deck; but the case concedes that the legal import of the contract, as well as the understanding and usage of merchants, impose upon the master the duty of putting them under deck, unless otherwise stipulated; and if such is the judgment of law upon the face of the instrument, parol evidence is as inadmissible to alter it as if the duty was stated in express terms. It was a part of the contract." And, again: "If the implied obligation of the master in this case, arising out of the conceded construction of this bill of lading, may be varied by parol testimony, I do not

see how any other stipulation included in it could be sustained in an offer to impeach it in the same way. Following the decisions of the Federal courts, we have already suggested that the obligation of the master to stow the goods under deck, is not drawn by construction from the instrument itself, but is an implication of law springing out of the ordinary course of business. This implication of law rests upon general custom, and not upon judicial construction of the written contract. (*The Peytona*, 2 Curtis's C. C. Rep. 23; *Vernard* v. *Hudson*, 3 Sumner, 406, 407.) In the latter case, Mr. Justice STORY remarks: "I take it to be very clear, that, where the goods are shipped under a common bill of lading, it is presumed that they are shipped to be put under deck, as the ordinary mode of stowing the cargo. This presumption may be rebutted, by showing a positive agreement between the parties; or, it may be deduced from other circumstances, such, for example, as the goods paying deck freight only. The admission of proof to this effect is perfectly consistent with the rules of law; for it neither contradicts nor varies anything contained in the bill of lading, but it simply rebuts a presumption arising from the ordinary course of business." In that case the bill of lading was in the common form, and a witness was admitted to prove a parol agreement to carry the goods on deck. It is true that the judge, in his comments upon the evidence, incidentally remarks that if such an argument had existed, "one of two things ought to have occurred, either that mere deck freight should be payable, or that there should have been some written memorandum on the bill of lading, to repel the inference from a full freight being stipulated for." But these latter remarks evidently refer to the preferable character of a written memorandum, and the bearing of its absence on the probability of the existence of such an agreement as that set up, and not to the exclusion of parol evidence of the agreement itself; for he had just previously stated that proof of such an agreement "neither contradicts nor varies anything contained in the bill of lading." But it is not essential, in deciding the case now before the court, to attempt to reconcile the principle laid down in *Creery* v. *Holly*, with other cases involving the precise point there determined; or, if it shall be deemed in conflict with them, to go into the inquiry as to which lays down the true doctrine. If that case conflicts with those here cited from the Federal courts, we should feel called upon to follow the rule held by the latter. As we have already stated, proof of usage or custom, with reference to which parties are presumed to have entered into

their contracts, is, under the law as declared by the courts of the United States, clearly admissible, as to their extent and scope, upon all matters which are not expressed in terms or evolved by construction. And especially where the law attaches conditions to a contract founded, not on the terms of the agreement, but on general custom, proof of a different custom of a particular trade may be given to show that the general custom does not apply to that trade. Indeed, such proof merely shows that, so far as that particular trade is concerned, the general custom does not exist, and therefore no presumption of law can be founded upon it.

We now come to the application of this doctrine to the present case. It is contended by the libellants that they have conclusively proved a clear, well-settled and uniform usage of the particular carrying trade in which this contract had its origin, in conformity to which goods of this description are stowed on deck in bins, as well as under deck. The evidence supports this claim. The route over which this trade passes, after leaving the St. Lawrence river, is by the Chambly river, the Chambly canal to Lake Champlain, down the latter to Whitehall, and from thence by the Champlain Canal to the Hudson river, and by the latter to Albany and New York, the usual ports of destination. Owing to the shallow water of the canals, it is always necessary, when a full load is taken, to lighter the boats in passing through them, and this is done by removing the deck load, which is put in bins for that purpose, and replacing it when the deeper water is reached. This is the only way the business can be made remunerative to the carrier. The claimant in this case has long been engaged in shipping grain, including oats, over this route, and is chargeable with knowledge of this uniform usage—a usage which rests on the necessities of the trade as affected by the limited depth of water over the artificial portions of the route. By this arrangement of bins on deck the carrier is able to transport the commodity at less rates of freight than could possibly be done, if he could take only what he could stow under deck. Thus the practice inures to the benefit of the shipper as well as the carrier, and the custom has become uniform and established with the consent and acquiescence of both parties, until it has assumed a clear and well defined usage of the trade. This usage being thus shown by clear proof, it follows that the general custom of the maritime world, by which common bills of lading are understood to import that the goods named in them are to be carried under

deck, has no application to this particular trade, and such bills of lading therein are relieved from its operation.

The accident by which a portion of the cargo was lost, occurred in a gale on Lake Champlain, while the libellant's boat was, with others, in tow of a steamer, the usual mode of passing this lake. The bins in which the deck load was contained, appear to have been built in the ordinary manner, staunch and strong; but as the steamer turned Cumberland Head, to go into Plattsburg, to avoid the violence of the gale, the boats she had in tow rolled heavily in the trough of the sea, striking against each other with violence, when one of the bins of the libellant's boat gave way, and a portion of the cargo was lost overboard. On a review of the whole evidence on this point, I am satisfied that the loss must be attributed to the perils or dangers of navigation, and is therefore within the exception in the bill of lading. The burden of proof on this point, as well as that touching the existence of the particular custom, is on the libellants, and I think they have made a clear case on both.

The libellants are also entitled, on the proofs, to fourteen days' demurrage. As to the rate of demurrage, I am not so clear. The testimony of the libellants on this question is confined mainly to one witness. He evidently states the highest rate. On the whole, I have fixed upon the rate at twenty dollars per day.

As there is no serious dispute as to the quantity of oats delivered, or the rate of freight, or the number of days of detention, I see no occasion for a reference.

Let a decree, therefore, be entered for the libellants for $624 freight, and $280 demurrage, making in all $904, with interest from December 16, 1861, the date of filing the libel.

For the libellant, *Mr. Van Santvoord;* for the claimant, *Mr. Bulkely.*

RECENT ENGLISH CASE.

Queen's Bench.—May 24, 25.

In Re PATRICK TURNAN AND OTHERS.

Habeas Corpus—Piracy jure gentium *and by Municipal Law—Extradition Treaty with America—*6 *and* 7 *Vict. c.* 76*—Warrant of Apprehension by Magistrate—*8 *and* 9 *Vict. c.* 120.

The 6 and 7 Vict. c. 76, sec. 1, which was passed to give effect to an Extradition Treaty between England and the United States, provides, that in case requisition shall be made by the United States, in pursuance of that treaty, for the delivery up of any person charged with the crime of "murder, &c., piracy committed within the jurisdiction" of the United States of America, who shall be found within the territories of Her Majesty, then it shall be lawful for a principal Secretary of State to signify to a magistrate that a requisition has been so made, and thereon the magistrate may, upon evidence given, issue a warrant for such person's apprehension.

Held, (per CROMPTON, BLACKBURN, and SHEE, JJ., COCKBURN C. J. *dissentiente*,) that "piracy committed within the jurisdiction of the United States does not include piracy *jure gentium*, but is confined to those offences which have been made piracy by the municipal law of the United States, and are thus within the *exclusive* jurisdiction of the tribunals of that country: and by

The court, that the magistrate's warrant, provided it is in the form prescribed by 8 and 9 Vict. c. 120, is not defective for not showing on its face that he has taken a preliminary examination on oath.

WRIT of *habeas corpus* directed to Miles Burton, keeper of the Main Bridewell, in the borough of Liverpool, commanding him to have before this court the bodies of Patrick Turnan, Patrick Murray, and John Quincy Sears, together with the day and cause of their taking, and detainer therein, to undergo and receive all and singular such matters and things as the said court shall then and there consider of and concerning them and each of them.

The return stated that the prisioners were in the custody of Miles Burton, under a magistrate's warrants of apprehension and remand, on a charge of having "on the high seas, on board a certain American ship, committed the crime of piracy within the jurisdiction of the United States of America."

The facts of the case are shortly as follows:—On the 16th November, 1863, the United States' steamer *Joseph L. Gerrity* left Matamoras for New York, with a cargo of cotton. Just

before sailing, several persons, amongst whom were the prisoners, came on board ostensibly as passengers. When the vessel had proceeded on her voyage for about fifty miles, these persons rose on the crew during the night, seized the master of the ship, and then took possession of her, professing to act on behalf of the Confederate States. On the 25th November they put the captain and some of the crew into a boat, close to Cape Catuchee, and sent them adrift. The steamer was afterwards navigated to Belize, in Honduras. Information having been received by the Federal Consul at Liverpool, during February last, that three of the persons who had seized the *Gerrity* were in that town, he applied to the Secretary of State for a warrant for their apprehension, with a view to their being delivered up to the American Government, as having committed piracy within the jurisdiction of the United States. The Secretary of State, in compliance with this application, signified to Mr. Raffles, a police magistrate at Liverpool, that a requisition had been made, pursuant to the Extradition Treaty between this country and the United States, for the delivery up to justice of Turnan, Murray and Sears; and Mr. Raffles, upon reading the information of the captain of the *Gerrity*, which was laid before him on the 23d February last, issued a warrant for their apprehension, in the form prescribed by 8 & 9 Vict. c. 120, of which the following is a copy:—

Borough of Liverpool to wit.

To the constables of the said borough, and to all peace officers of the said borough:

"Whereas the Right Hon. Sir G. Grey, one of her Majesty's principal secretaries of state, by a warrant under his hand and seal, dated the 20th day of February, 1864, and signified to me, that pursuant to the Treaty made between her Majesty and the United States of America, in the year of our Lord 1842, and of an Act of Parliament passed in a session holden in the sixth and seventh years of her Majesty's reign, 'An Act for giving effect to a Treaty between her Majesty and the United States of America,' for the apprehension of certain offenders, a requisition was made to deliver up to justice James Clements, J. Wilson, and Daniel O'Brien [called in the writ Turnan, Murray and Sears] charged with the crime of piracy on the high seas, within the jurisdiction of the United States of America:

"These are therefore to command you in her Majesty's name, forthwith to apprehend the said J. Clements, J. Wilson, and Daniel O'Brien, pursuant to the before-mentioned Act of

Parliament, wherever they may be found in England, and bring them before me, or some other magistrate sitting at this court, to answer unto the said charge for which this shall be your warrant.

"Given under my hand and seal, at the Police Court at Liverpool, in the borough aforesaid, this 23d day of February, 1864.

(S.gned) "S. RAFFLES."

The men were accordingly arrested, and brought before him on several occasions, and remanded. During the continuance of one of the remands, this application for a writ of *habeas corpus* was made. It was agreed by both sides that the argument on the sufficiency of the return to the writ should be conducted as though the prisoners had been actually committed, the evidence offered before the magistrate being in fact complete. The Treaty of Extradition between this country and America is "A Treaty to settle and define the boundaries between the possessions of her Brittanic Majesty in North America and the territories of the United States, for the final suppression of the African slave trade, and for giving up of criminals, fugitives from justice, in certain cases." Articles I. to VII. related to the first subject; Articles VIII. and IX. to the second; and Article X. to the third. The preamble of the treaty, so far as it related to the subject, was as follows:— "Whereas it is found expedient for the better administration of justice, and the prevention of crime within the territories and jurisdiction of the two parties respectively, that persons committing the crimes hereinafter enumerated, and being fugitives from justice, should, under certain circumstances, be delivered up;" it was agreed (by Art. X.), that her Britannic Majesty and the United States shall, upon mutual requisitions by them or their ministers, officers, or authorities, respectively made, deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or shall be found within the territories of the other." To give effect to the treaty, the statute of 6 & 7 Vict. c. 76 was passed, which provided, section 1, "that in case requisition shall at any time be made by the authority of the said United States, in pursuance of, and according to, the said treaty, for the delivery of any person charged with the crime of murder, or assault with intent to commit murder, with the

crime of piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of the United States of America," who shall be found within the territories of her Majesty, it shall be lawful for one of her Majesty's principal Secretaries of State . . . by warrant under his hand and seal, to signify that such requisition has been so made, and to require all justices of the peace, and other magistrates and officers of justice within their several jurisdictions, to govern themselves accordingly, and so aid in apprehending the persons so accused, and committing such person to jail, for the purpose of being delivered up to justice, according to the provisions of the said treaty; and, thereupon, it shall be lawful for any justice of the peace . . . to examine upon oath any person or persons as to the truth of such charge, and, upon such evidence as, according to the laws of that part of her Majesty's dominions, would justify the apprehension and committal for trial of the person so accused, if the crime of which he or she shall be so accused had been there committed, it shall be lawful for such justice of the peace . . . to issue his warrant for the apprehension of such person, and also to commit the person so accused to jail, there to remain until delivered pursuant to such requisition as aforesaid."

Section 2 enacts that copies of the depositions upon which the original warrant was granted, certified under the hand of the person issuing such warrant, and attested upon the oath of the party producing them, to be true copies of the original depositions, may be received in evidence of the criminality of the person so apprehended.

Section 4 enacts that if any person committed under the Act shall not be delivered up and conveyed out of her Majesty's dominions within two calendar months after such committal beyond the time required to convey him out by the readiest way, any judge may, on application to him, and on proof of notice having been given to some or one of her Majesty's principal Secretaries of State, &c., "order the prisoner so committed to be discharged out of custody, unless sufficient cause shall be shown to such judge or judges why such discharge ought not to be ordered."

No *certiorari* had been issued to bring up the depositions, and the return merely set out the warrant of the Secretary of State. It was, however, agreed that the proceedings before the magistrates for the purpose of the extradition, which had been used on showing cause against the writ, should be considered as before the Court on this occasion.

James, Q. C., now moved that the prisoners should be discharged.

This case is not within the statute. The crime charged must be taken to be piracy *jure gentium;* no violation of the municipal law of the United States is set forth, and the Court will not take judicial notice that there is any other piracy than that *jure gentium*, and that which is created by English law. The offence here cannot be the latter; it is, therefore, if anything, the former. Such piracy, however, is not within the Act, for it is within the concurrent jurisdiction of all countries, being a crime against all; but the Act is confined to cases occurring within the exclusive jurisdiction of the State demanding the surrender. The evil which existed previous to the treaty and statute, and which they were designed to meet, was the total failure of justice, which occurred when a criminal took refuge in a State where he could not be tried for the offence of which he was guilty. Now, this used to happen when the crime was committed beyond the jurisdiction of the State in which the criminal was found, since jurists were agreed neither as to whether any duty at all lay on a State to take notice in any way of a criminal taking refuge within its borders, nor as to what was the nature of the duty if it existed (Kent's Com. i. 36, 37). That this was the object of the treaty appears by the language both of its preamble, and its provisions; the persons to whom it relates are described as fugitives from justice, and are by the treaty to be "delivered up to justice,"—implying clearly that but for the treaty they would be free from justice. With respect, in particular, to the circumstances of piracy, there were at the date of the treaty circumstances requiring its application; for in both countries laws had been passed making certain acts piracy, which was not so by the law of nations, and which, therefore, could not be tried by a state beyond whose jurisdiction they were committed. Instances of such laws were the statute of 11 & 12 Will. 3, c. 7, s. 8, by which it was made piracy in any British subject to commit any act of hostility against any other of his Majesty's subjects under color of the authority of a foreign sovereign, and an Act of Congress passed in April, 1790, which enlarged the definition of piracy. The contrary construction would also be in a high degree inconvenient, for, as the words of the statute are not discretionary but imperative, the British Government might, under it, be bound to surrender a British subject who had, within the jurisdiction of the United States, committed a crime, for which, in his character of British subject, he might be tried here; and

even though he had already been put upon his trial. And, again, a commitment having been made under the statute, the prisoner would, under section 4, if not removed within two months, by the Government demanding him, be entitled to be discharged, although guilty of a crime (as, for instance, piracy *jure gentium*) triable here. The view contended for is that taken in the United States, as is shown by the speech in Congress of Mr. (afterwards Chief Justice) Marshall, on the case of Robins, which arose on a treaty similar to the present one, but not including piracy; (5 Wheaton's Supr. Courts Rep. App. 1) and by the judgments in *Re Kaine* (14 Howard's Supr. Courts Rep. 103, 137), especially that of NELSON J. Secondly, if it be intended to charge the prisoners with piracy by the municipal law of the United States, there is no sufficient statement of the charge in the warrant. Thirdly, the original depositions—that is, depositions taken in the country where the crime was committed—are a necessary foundation to the warrant of the Secretary of State: Wheaton's International Law, 241, 242. Section 2 of 6 and 7 Vict. c. 76, makes copies of the depositions the evidence, wherever the magistrate is to act. But here there are none such. Fourthly, the magistrate's warrant is bad, for not showing that he had taken any examination upon oath, which, as made in the exercise of a limited statutory jurisdiction, it ought to do; *Mash's case*, 2 W. Bl. 805; *Nash's case*, 4 B. & Ald. 295; *Case of the Sheriffs of Middlesex*, 11 A. & E. 283; *Kite and Lane's case*, 1 B. & C. 101; *Ex parte Bessett*, 6 Q. B. 481. Fifthly, no piracy has been committed here at all. Piracy depends on circumstances; and acts, which in a time of peace would be evidence of the crime, are not so when done by one belligerent against another. Here there was as much evidence of authority from the Confederate States as could be expected under the circumstances, and the prisoners professed to act under such authority. But if done without authority at the time, it was capable of ratification afterwards, and had, in fact, been since adopted by the Confederate States. Further, even private subjects were, so far as the enemy was concerned, and therefore, so far as to exclude them from the class of pirates, entitled to seize, without authority from their Government, property belonging to the enemy. This must be considered as an act of war, not of piracy; and there is, therefore, no evidence on which the prisoners could have here been put on their trial.

He cited *Palmer's case*, 3 Wheaton Sup. Court Rep. 610, 642; *The Melomane*, 5 Rob. 41; Kent's Com. i. 95.

Littler, and *P. H. James*, followed on the same side.

Lush, *Q. C.* for the prosecutors.—Both warrants are regular. (1) No depositions are necessary to justify the Secretary of State in issuing his warrant, although it is the practice to require at least an information on oath, which has been given in this case. (2) The magistrate's warrant need not state that he had taken examinations on oath, for no such statement is made in the ordinary case of a justice's warrant, which, by 11 and 12 Vict. c. 42, s. 1, must be issued on an information on oath. Nor did any such statement occur in the form of warrant prescribed by 8 and 9 Vict. c. 120, which extended the power of metropolitan police magistrates to grant warrants under the Extradition Acts. [The court relieved him from further argument on this part of the case.] As to the main point, piracy *jure gentium* is included in the terms of the treaty and statute. The words used must be read in their natural sense, and not with the qualified meaning contended for by Mr. James. The chief object of extradition treaties, no doubt, is to punish crime, and hence it happens that many such treaties only provide for offences exclusively punishable by the one country or the other. But in this treaty "piracy" was inserted, though it is absent from many of a similar character, and, having been so inserted, it must be taken to mean all those offences which both nations call "piracy;" and therefore it includes piracy by English and American municipal law, and also by the law of nations, if committed "within the jurisdiction" of either of the contracting parties. "Jurisdiction" must not be read "exclusive jurisdiction," if the crime specified is one over which both countries have jurisdiction. Here the offence was committed on an American ship, a place where American law prevails, and, therefore, "within the United States' jurisdiction." It is an offence, moreover, with which the tribunals of the State to which the pirate belongs are *peculiarly* fitted to deal, and in which they are *especially* interested. English pirates ought to be tried here, and American pirates in America. The policy of the statute was certainly to include such cases. The language is without limitation. It applies to "*all* persons charged with piracy, &c.," and "piracy" is left also undefined. Had the parties meant to limit its meaning, a definition might have been inserted, just as "murder" is defined in the French Treaty of Extradition. But, not having limited the word, although they were aware that there were piracies by American and English municipal law, not piracies *jure gentium*, they must be held to have deliberately used it in its widest sense. There

is no express authority one way or the other. *Re Kaine*, *ubi sup.*, is distinguishable; the question of concurrent jurisdiction was not argued on that occasion. Lastly, as to the act being one of warfare, and not piracy, that is a matter for the jury to decide on the trial. There is abundant *prima facie* evidence to justify the committal of the prisoners.

Milward, and *V. Lushington*, followed on the same side.

The following authorities were referred to in the argument for the prosecutors:—*Reg.* v. *Lopes*, Dears & Bell, C. C. R. 525; *United States* v. *Gibert*, 2 Sumner 26; Wheaton's International Law, 208, 230, 233.

James, *Q. C.* in reply.

Cockburn C. J.—The main and principal question for our determination in this case is, what construction is to be put upon the statute of the 6 and 7 Vict. c. 76, which gives effect to the treaty for the extradition of criminals between the United States and this country. Besides that, indeed, there are some minor points which have been raised with reference to the regularity of the proceedings. It has been objected that, prior to the issuing of the warrant by the Secretary of State, there should have been depositions taken, and an original warrant issued in America; but it seems to me that this objection cannot be maintained. The 2d section of the statute does not require the production of such an original document nor its issue. The whole effect of that section seems to be, that the evidence which must be given before the magistrate may be made up of copies of the original depositions if there had been a previous warrant. Another objection raised was, that the magistrate's warrant was imperfect, because it did not set forth that evidence on oath had been offered to support the charge; but Mr. Lush met this satisfactorily by showing that the form given by the 8 and 9 Vict. c. 120, had been followed exactly. Then comes the great question as to the construction of the 6 and 7 Vict. c. 76. Now, the words are undoubtedly, in their primary and ordinary signification, large enough to comprehend this case. Provision is made for the delivery up to justice of persons who have "committed piracy within the jurisdiction of the United States." Now, there can be no doubt that, if the case is one of piracy at all, it is a piracy *jure gentium*. Nor can there be any doubt that, if it was piracy, it was committed on board an American ship, and so in that sense within the jurisdiction of the United States. The main argument on which reliance has been placed on the part of the prisoners is, that the statute is to be read as applicable only to a case where the

offence has been committed within the *exclusive* jurisdiction of the United States. But if the term piracy in the act is to be read as meaning piracy *jure gentium*, then it appears to me that this contention on the part of the prisoners is at once disposed of. If the contracting parties intended that such piracy should be deemed within the treaty, then—as it is clear that such piracy is not an offence against any particular State, but against the whole civilized world—then the case would not be one in which the offence was committed within the exclusive jurisdiction of the United States. So that if the word "piracy" is used in the statute in the largest sense, the case for the prisoners falls to the ground. Now, what is there to show that the term "piracy" has been used in a more limited sense? If it is to be restricted to piracy by municipal law, as a matter of peculiar jurisdiction in the courts of the particular country, then, no doubt, the statute may be construed in the sense contended for by Mr. James in his most able argument, that is, in the sense of an exclusive jurisdiction in the country claiming extradition. But if that had been the intention, we should have had piracy by municipal law in some way distinguished from piracy in the larger acceptation of the term, and no such limitation occurs in the Act. Why, then, should the term be taken in the limited sense? It is said, and with truth, that the mischief extradition treaties are primarily intended to prevent, is that of persons committing crimes within the territory of one State, and within its jurisdiction, escaping beyond the reach of that jurisdiction, and so enjoying impunity for their offences. No doubt this was the *primary* object, but that it was the only object of such treaties, I entertain great doubt, because it is impossible not to see that the mischief which it is desirable on the part of all civilized States to prevent, is not limited to such cases as those which I have just suggested. It may be that the offence may be cognizable or "justiciable" in two countries—as in the case of a murder committed by one British subject upon another in the United States, or any foreign country, in which case, no doubt, the criminal may be tried here. Yet it would be highly inconvenient, if, in any such case, he must be tried in this country. For criminals—as I observed in the course of the argument—may escape, not only by going beyond the territory and the power of the law of the country in which the crimes have been committed, but by the difficulty of proof everywhere, except in the country where the crimes were committed. If, then, the language of the act is large enough to comprehend both these kinds of mischief, it seems to me that it would be

highly inconvenient to restrict it to the former mischief alone. It has been urged, indeed, with great force, that it is inconsistent with the dignity of this country to surrender the jurisdiction of its own tribunals in a case of concurrent jurisdiction, and allow persons who could be tried here, to be carried away to be tried elsewhere. But it seems to me that the moment you say you will give up offenders with a view to promote the large interests of justice throughout the whole civilized world, as a matter in which all nations have a common interest, you must then look to see what is the extent and scope of the mischief you thus desire to counteract and to prevent; and I cannot see that there is any abandonment of national dignity or honor in saying that, though there may be concurrent jurisdiction in respect of offences which have been committed by our own subjects in foreign countries, yet if the foreign States against whose laws the crimes have been committed, require that the criminals should be surrendered to justice, and justice can be better done in the country in which the offence is committed, then I cannot see that there is any violation of national dignity or character in doing that which is expedient and desirable to promote the interests of justice. And, looking to the general balance of convenience, I think that if the treaty and the act were not capable of the construction I feel bound to put upon them, they would fail in the object they were meant to accomplish, and would require amendment. And, as I feel strongly that the words are large enough to include the case of piracy *jure gentium*, and see no reason for adopting a more limited construction, I think that, if there was a *prima facie* case of such piracy before the magistrate, the case comes within the act. It is impossible, in my opinion, to limit the word "jurisdiction" by the insertion of the word "exclusive," and on that point I adopt the view taken by Mr. Lush in his most able argument—that the true meaning of the word is the area over which, whether it be land or sea, the laws of the particular State prevail; and, inasmuch as it is conceded that the ship of a certain territory is constructively part of its territory, or, at all events, a place where its laws prevail, this ship was within the jurisdiction of the United States. I feel, therefore, bound (though I regret to differ from my learned brethren), in adherence to the view which I take of the statute, to hold that this case comes within it, and, therefore, that the prisoners are not entitled to be discharged.

As to the other question, whether, supposing piracy *jure gentium* to be within the act, there was sufficient *prima facie* evi-

dence of it, I agree in everything Mr. James said as to acts done with the intention of acting on the behalf of one of the belligerent parties; and I concur in thinking that persons so acting, though not subjects of a belligerent State, and though they may be violating the laws of their own country, and may even be subject to be dealt with by the State against whom they thus act with a rigor which happily is unknown among civilized nations in modern warfare, yet if the acts were not done with a piratical intent, but with an honest intention to assist one of the belligerents, such persons cannot be treated as pirates. But then it is not because they assume the character of belligerents that they can thereby protect themselves from the consequences of acts really piratical. Now, here it is true that the prisoners at the time said they were acting on behalf of the Confederates; and that, we are told, is in fact equivalent to hoisting the Confederate flag. But then, pirates sometimes hoist the flag of a nation in order to conceal their real character. No doubt, *prima facie*, the act of seizing the vessel, saying at the same time that it is seized for the Confederates, may raise a presumption of such an intention; but then all the circumstances must be looked at to see if the act was really done piratically, which would be for the jury; and I cannot say that the magistrate was not justified in committing the prisoners for trial. It is, however, unnecessary to say more upon this point, as, upon the main question, my learned brethren (for whose opinions I have the utmost deference, and who, I have no doubt, are right) are of opinion in favor of the prisoners, and therefore they will be discharged.

Crompton J.—I had not the advantage of hearing the preliminary arguments on this case, but it has been most fully and ably argued on the present occasion. It is an application for a writ of *habeas corpus*, and we are asked to discharge the prisoners, because the custody is illegal. There has been no commitment by the magistrate as yet, but only a remand; and therefore I should not have thought it right to interfere had not the point been waived, and our decision requested, just as though there had already been an actual commitment. As a rule, it would certainly be inconvenient to interpose before the final decision of the magistrate, as fresh evidence might be forthcoming. But, taking it as though these prisoners had been committed, is there anything that, in point of law, shows that the commitment is illegal? That depends, first, on a pure question of law, on the construction of the act; and then on a question of law turning on the facts, whether the evidence was

sufficient to warrant a committal, supposing the case to be within the act. Upon the latter point I quite concur with my Lord, because it is not for us to weigh the effect of the evidence, which is for the jury; and all we can consider is, whether there was enough to justify a committal for trial, and I agree with my Lord that we cannot say that there was not. But upon the other and the main question I have come, after a careful consideration of the case, to a different conclusion.

The preamble of a statute is a good key to its meaning, and here the preamble of the statute points clearly to offences committed within the jurisdiction of either of the contracting States —that is, within the jurisdiction of one of them, and not of the other. And then it goes on to speak of persons who, having committed certain crimes within the jurisdiction of one of the two States (that is, as I read it, of one of them, and not of the other), shall "seek an asylum" and be found in the territory of the other. Now, an "asylum" surely means a place where the criminal is safe from prosecution or pursuit, not a place where he may be tried and convicted. The enactments of the statute apply to cases in which persons having committed murder or robbery within the jurisdiction of the United States afterwards seek an asylum, or are found in British territory; and it appears to me that they mean only cases of crimes committed within the exclusive and peculiar jurisdiction of the United States. And that phrase, of course, could not be applied where the crime is equally within the jurisdiction of every nation in the world, as in piracy *jure gentium*. It would not be a proper use of words to say that such a crime was committed within the jurisdiction of the United States. Those words, "within the jurisdiction of either of the contracting States," mean, within the jurisdiction of either of them respectively or relatively to each other—*i. e.*, of one of them, and not of the other. But here the crime was within the jurisdiction, not only of both of them, but of every nation in the world. Then the persons charged are to be "delivered up to justice,"—that is, to the justice of the country where justice can be done, implying that they are in a country where it cannot be done. Otherwise, when the men were actually committed for trial in this country, or even if they had been tried and acquitted, they might be claimed, to be tried abroad, which, surely, would be a strange construction of the act. Indeed, according to that construction, one does not see why they might not be claimed back again by this country. For this is clearly, if anything, a case of piracy *jure gentium*, and triable in either country. The fact that the

men, being in the ship, seized it, makes no difference; it is equally piracy, unless it was an act of belligerency. No doubt the case would be within the jurisdiction of the United States, but it would be a jurisdiction shared equally with the whole world. Is that a case within the meaning of the act? Surely it would be a strange construction of its terms, and it must mean peculiar and exclusive jurisdiction. My view of the act is also confirmed by some high American authorities. Thus, in the able judgment of Mr. Justice Nelson, in the case of *In re Kaine*, 14 Howard's American Reports, 137, we find these words: "The two nations agree that upon mutual requisition by them, or their officers or authorities respectively made—*i. e.*, on a requisition made by either one Government, or by its ministers or officers properly authorized—upon the other, the Government upon whom the demand is thus made shall deliver up to justice all persons charged with the crimes as provided in the treaty, who shall have sought an asylum within her territories—in other words, on a demand made by the authority of Great Britain upon this Government, it shall deliver up the fugitive; and so in respect to a demand by the authorities of this Government upon her. This is the exact stipulation entered into when plainly interpreted. It is a compact between the two nations in respect to a matter of national concern—the punishment of criminal offenders against their laws—and where the guilty party could be tried and punished only within the jurisdiction whose laws have been violated." Chief Justice Taney and the other judges referred to this judgment as containing an exposition of the law on which they based their own judgments, and the result is that the statute's application is confined to cases where justice can *only* be obtained by means of extradition. It is difficult to see that two great maritime nations would have given up the power of punishing pirates whenever they were caught. Take the case of a pirate taking an American, an English, and a French vessel on the same day in some of those distant seas where pirates abound. Why should not the courts of either of the three countries in which the pirates might be found do justice upon them? It is said that we must trust to the discretion of the other State, that it will not demand extradition in cases where it is unreasonable to do so. But that is very dangerous doctrine, to which I cannot subscribe; and I think it is far more wise to construe the act, which is peremptory in its terms, in such a way, if we can, as to exclude cases in which the demand would be unreasonable.

At first sight it certainly occurred to me that the word "pi-

racy," in its primary sense, was against my reading of the statute, but that was answered by Mr. James, in his able argument, for he stated that there were some species of piracy by the municipal law of America, not piracy by our law. It was said by Mr. Lushington, that the jurisdiction would depend upon whether the ship was the ship of one nation or of another, but that can hardly be so. It is an offence against all nations. The pirates are not English pirates or American pirates, but pirates against all nations. The principal argument in support of the committal, was founded upon the fact that he ship was American; and it was argued that, therefore, the case was, in some peculiar way, within American jurisdiction. But I doubt that. The piracy, if piracy at all, was not altered in character, because committed in the ship itself which was seized. Suppose the prisoners had been in a ship of their own, and sunk the other, without ever going into it? it would be the same offence, and equally, in both cases, it would be within the common jurisdiction of the courts of all nations. And it does not appear to me, therefore, that it could be said to be within the jurisdiction of the United States, more than of any other country. Nor can I see that in this statute the two States have given up their jurisdiction to try pirates, whenever they can take them. I think, therefore, that the case is not within the statute, and that the prisoners are entitled to be discharged.

Blackburn J.—I concur with my learned brethren in thinking that the prisoners must be discharged. They have been remanded only, and not committed; but it is agreed that the evidence is complete, and we are to deal with the case as though there was a commitment, a course which, as a rule, it would be inconvenient to adopt. Now what power is it that gives the magistrate the right to commit these men, for the purpose of delivering them up to the American Government? There is none, except that given by 6 and 7 Vict. c. 76, and our duty is to inquire into the meaning of that statute. It was passed to carry out a treaty between Her Majesty and the United States, and it provides for the delivery up of criminals in certain specified cases. It recites an agreement between the two nations to "deliver up to justice all persons who, being charged with the crime of murder . . . piracy, arson, robbery, or forgery, . . . committed *within the jurisdiction* of either of the high contracting parties, should seek an asylum within the territories of the other." This agreement is to be construed just like any other contract, and the question is, what the words "committed within the jurisdiction" mean? I think that the

statute is applicable only to cases of crimes committed within the jurisdiction of one of the States, and not of the other; and that it does not apply to crimes committed equally within the jurisdiction of both. I think this is clear, whether we look to the terms of the act, or to its obvious object. The main argument in favor of the opposite view is founded upon the force of the word "piracy," which, it is urged, in its primary sense, means piracy *jure gentium*, and so must apply to cases within the jurisdiction of both countries, and no doubt it would include such piracy if it stood alone: but then there are the words "committed within the jurisdiction of one of the contracting States," which run through the act, and are its governing words. The question is not of territorial jurisdiction, but of piracy, which is quite different, and depends on general jurisdiction. In Kent's Commentaries, vol. 1, p. 186, I find it written, "It is of no importance, for the purpose of giving jurisdiction, on whom or where the piratical offence has been committed; the pirate, who is one by the law of nations, may be tried and punished in any country in which he is found. Statutes in one country may declare an offence committed on board of one of its own vessels to be a piracy, and such an offence may be punishable exclusively by the nation which passed the statute; but piracy by the law of nations is an offence against all nations, and punishable by all." Such is the law as laid down by that great American authority, and so it is laid down by our own authorities; and the treaty must be supposed to have been entered into with a full knowledge of it. Why, then, should piracy by the law of nations be deemed within the jurisdiction peculiarly of one of the two states? It would be so if it were piracy only by virtue of its own municipal law. The American citizen who has done an act declared to be piracy by American statutes, would be within American jurisdiction; and the English subject, who has done an act which was declared piracy by an English statute, would be within English jurisdiction; and such piracy, no doubt, would be within the treaty, and America would give up an English subject who had committed piracy by English law, and England would give up American subjects who had committed piracy by American law. But the man who has committed piracy *jure gentium*, is equally within the jurisdiction of either country, and peculiarly within the jurisdiction of neither, and so is not within the meaning or the mischief of the statute. It is true there may be cases in which it may be more convenient that the prisoners should be tried in one country than in another,

but this is a question, not of convenience, but of jurisdiction. As to the evidence of piracy *jure gentium* in this case, its effect would be for the jury; but though the Confederate States are not recognized as independent, they are recognized as a belligerent power, and there can be no doubt that parties really acting on their behalf would not be criminally responsible. But the case is either one of piracy by the law of nations—in which case the men cannot be given up, because they can be tried here—or it is a case of an act of warfare, in which case they cannot be tried at all; and as they are now detained for the purpose of being delivered up to the American Government, they are entitled to be discharged.

SHEE J.—We have had the advantage in this case of hearing two arguments, one on the motion for the rule, and another on this motion for the discharge of the prisoners. I have referred to and considered the cases which have been cited, and agree with my brothers Crompton and Blackburn, that the prisoners must be discharged. The crime with which they are charged as described in the return, and as appears on the depositions, is "piracy on the high seas," a crime of pre-eminent enormity, and by the law of nations, is justiciable wherever the offender may be found. It is not, in my opinion, the crime for which, under the name of piracy, extradition is stipulated in the treaty of the 9th of August, 1842; the provisions of that treaty were not needed for, nor are they, as it appears to me, applicable to its repression. The treaty provides that persons charged with having committed the crimes of murder, piracy (not piracy on the high seas), arson, robbery, or forgery, within the jurisdiction of the United States, and seeking an asylum in or found in the territories of our sovereign, shall, on the requisition of the United States, be delivered up to justice. The object of the 10th article of the treaty, as appears from its provisions and from the title and enacting clauses of the 6 & 7 Vict. c. 76, which gave effect to it, was to legalize the apprehension within the territories of the Queen of persons charged with the commission of the crimes mentioned in the treaty within the jurisdiction of the United States for the purpose of their surrender to that jurisdiction. The persons whose apprehension and extradition are contracted for by the treaty, and authorized by the Act of Parliament, are persons "fugitive" from the justice of the United States, and "seeking an asylum" that is (but for the treaty and the Act of Parliament) safe in the asylum of the territories of our Queen, because not liable to be arraigned before her tribunals.

The words "surrender," "deliver up to justice," mean deliver from an asylum or place of safety up to justice—that is, to the ministers of justice of the United States, by whose courts only, on the persons charged with the crimes imputed, justice can be done. Read with reference to the declared object of the treaty and the Act of Parliament, and by the light which the words "fugitive," "seeking an asylum," "surrender," "deliver up to justice," afford, the words "within the jurisdiction" must, as I think, mean within the exclusive jurisdiction of the United States, and cannot be held to extend to crimes not within any jurisdiction exclusively, but justiciable wherever the person charged with having committed them may be found. It is injurious to suppose that a State should have admitted in a public treaty the possibility of its unwillingness or inability to do justice by binding itself to surrender to the justice of another State persons charged with the commission of crimes which it would be the duty of both to punish, and over which both would have jurisdiction. Had this been intended, provision would surely have been made for the case of justice by acquittal or conviction having been done by one State before cognizance of the crime taken by the other—for pleas of *autrefois convict*, or *autrefois acquit*—familiar to the jurisprudence of both States, and for proof by certificate of the record of conviction or acquittal—that the crime for which the offender had been in jeopardy, was the crime for which extradition was claimed. But the treaty and the Act of Parliament contain no such provisions, though stipulations for the extradition of criminals had been long in force between the two Governments, and the meaning of the words "within the jurisdiction" had been the subject of serious discussion between them. Upon the words, therefore, of the treaty and the Act of Parliament alone, I should have been prepared to hold that the words "within the jurisdiction" mean within the exclusive jurisdiction of the State requiring the extradition.

It is satisfactory to have learnt, in the course of the argument, from the case *In re Kaine*, 14 Howard, cited by Mr. James, that in the American courts, to the decisions of which respect is always, and most justly paid by us, the same construction had long, *ante litum motam*, been put upon the treaty by learned judges of the highest authority. We have been invited to consider—and I think we must consider—the state of the law in the United States, as respects piratical offences before the date of the treaty, in order the more satisfactorily to determine to what extent the provisions of the treaty would

take effect if the word "exclusive" were added to the words "within the jurisdiction"—that is, first, within the exclusive jurisdiction of the United States as respects the place where the offence was committed; secondly, within the exclusive jurisdiction of the United States as respects the person by whom the offence was committed. It will be seen, I think, on reference to the legislation of the United States, before and at the time the treaty was signed, that, consistently with that legislation, the words "within the jurisdiction," in both of these meanings, may have, as respects offences of a piratical character, a very extensive range, without including the crime of "piracy on the high seas."

The Constitution of the United States gave power to the Congress to define, among other crimes, the crime of piracy. It was inherent in the Sovereignty of the United States, as respects the subjects of the United States, to designate as piracy, and punish as piracy, crimes committed within its jurisdiction which were not "piracy on the high seas," not piracy by the laws of nations. The Act of Congress of the 30th of April, 1790, provides "that if any person shall commit upon the high seas, or in any river, haven, basin, or bay, out of the jurisdiction of any particular State, murder or robbery, or any other offence which, if committed within the body of a county would, by the laws of the United States, be punishable with death; or if any captain or mariner of any ship, or other vessel, shall piratically and feloniously run away with such ship or vessel, or any goods or merchandise to the value of fifty dollars, or yield up such ship voluntarily to any pirate; or if any seaman shall lay violent hands on his commander, thereby to hinder and prevent his fighting in defence of his ship or goods committed to his trust, or shall make a revolt in the ship; every such offender shall be deemed, taken, and adjudged to be a pirate and a felon, and being thereof convicted, shall suffer death. And that, if any citizen shall commit any piracy or robbery aforesaid, or any act of hostility against the United States, or any citizen thereof upon the high seas, under color of any commission from any foreign Prince or State, or on pretence of authority from any person, such offender shall, notwithstanding the pretence of any such authority, be deemed, adjudged, and taken to be a pirate, felon, and robber; and, on being thereof convicted, shall suffer death." These provisions, most of which are, with little more than verbal alteration, taken from our own statute book, include, as respects citizens of the United States, and persons owing temporary allegiance to them

in return for the protection of their laws, not only piracy by the law of nations, but offences also, which are only piracy, because the municipal law-givers have chosen so to call them. By an Act of Congress of March 3, 1819, c. 75, s. 5, it was enacted that, if any person on the high seas should commit the crime of piracy, as defined by the law of nations, he should, on conviction thereof, suffer death. By an Act of Congress of the 5th of May, 1820, it was enacted that, any person who should, upon the high seas, or in any open roadstead (which has been held in the Supreme Court of the United States to be upon the high seas), or in any haven, basin, or bay, or in any river where the sea ebbs and flows, commit the crime of robbery in or upon any ship or vessel, or upon any of the ship's company of any ship or vessel, or the lading thereof, such person shall be adjudged to be a pirate; and, being convicted thereof, shall suffer death. And if any person engaged in a piratical cruise or enterprise, or being of the crew or ship's company of any piratical ship or vessel, shall land from such ship or vessel, and on shore shall commit such robbery, such person shall be adjudged a pirate; and, on conviction thereof, shall suffer death."

It thus appears that the Legislature of the United States, in framing municipal laws for the repression of offences of a piratical character, has always kept in view and made special mention of "piracy on the high seas," grouping with it, however, a large class of offences which bear a strong family resemblance to it, committed within the territorial or personal jurisdiction of the United States, but which are not piracy by the law of nations—viz., "robbery in any river, haven, basin, or bay, out of the jurisdiction of any particular State of the United States, upon any vessel, or upon the lading or ship's company of any vessel in any open roadstead, haven, basin, or bay, or in any river where the sea ebbs and flows;" on land, if the robbery be committed by persons engaged in a piratical cruise or enterprise, or being of the ship's crew or ship's company of any piratical ship or vessel, who shall land from such ship or vessel, and on shore commit such robbery. Many of the crimes thus defined, though included in a list at the head of which is "piracy on the high seas," and classed with it as equal in guilt and deserving of equal punishment, differ from it in the essential particular that they are not committed on the high seas, but within the territorial jurisdiction of the United States; and, being committed within the territorial or personal jurisdiction of the United States, they are offences, not against our

laws (though we have laws to the same effect), but against the laws of the United States. Regard being had to this legislation, which must have been in full view of the American minister who negotiated this treaty, it is a remarkable feature of the treaty, tending strongly to show that "within the jurisdiction" means within the exclusive jurisdiction, territorial or personal, of the United States; that, though "piracy" committed within the jurisdiction of the United States—and, as if to avoid all cavil as to its meaning—"robbery" are mentioned, piracy on the high seas—piracy by the law of nations—has been omitted. For these reasons I am of opinion that the true reading of the words "within the jurisdiction" is within the exclusive jurisdiction of the State requiring extradition. As to the second point, I agree with my Lord that the facts before us tend rather to show that the prisoners, in what they did, acted *animo furandi* rather than *animo belli gerendi*, and would be sufficient, if the point on the meaning of the treaty were against them, to justify their committal for trial. And on the points of form I agree with the rest of the court.

Lord Justice's Court.

THE SOLICITORS' AND GENERAL LIFE ASSURANCE SOCIETY *v.* LAMB.

Policy—Condition—Assignment—Suicide.

A effected upon his own life a policy of assurance, which contained a provision that if the assured should die by his own act the policy should become void, except to the extent of any interest acquired thereon by assignment for valuable consideration.

A mortgaged the policy, together with other property, to B, as a security for an advance exceeding the amount of the policy, and amply secured by the other property exclusive of the policy.

A afterwards died by his own act.

Held, that the policy was valid to the extent of the interest of the assignee, and that the insurers, having paid the amount to the assignees, had no equity to obtain re-payment from the estate of A.

THIS was an appeal from a decree of Vice-Chancellor Wood, dated the 18th of March, 1864, dismissing the plaintiffs' bill, with costs.

The plaintiffs were an assurance company, with whom Frederick Lamb had, by two policies dated in 1853, insured his life

for £1500. Both policies contained the following clause:—"That if any person who has assured his own life shall die by duelling, or by his own act, whether felonious or not, or by the hands of justice, this policy shall become void, except to the extent of any interest acquired therein by actual assignment by deed for valuable consideration, or as security or indemnity, or by virtue of any legal or equitable lien as security for money, upon satisfactory proof to the board of directors of the existence and extent of such interest. But in case the assured continue to be the holder of the policy up to the time of his decease, the directors may, if they think fit, pay or allow for the benefit of his family such sum not exceeding the amount the society would have paid to the assured for the purchase of his interest in the policy on the day of his death." The above policies were, with certain real estates, mortgaged by Frederick Lamb to Thomas Ridgway, to secure £8700, and were subsequently mortgaged to James Ware and Robert Dawbarn, to secure £2000. Frederick Lamb died by his own act on the 8th of February, 1861.

An action was brought by the mortgagees in the name of Mary Ann Lamb, the executrix of Frederick Lamb, to recover the amount due on the policy, and the society, being informed that, as against the mortgagees, they had no sufficient defence, paid the money to Ridgway. They then filed the present bill against Mary Ann Lamb, alleging the above facts, and that the real estates comprised in the mortgages being more than sufficient to cover the amount due to the mortgagees, the company were entitled to stand in the shoes of the mortgagees against the estate of the insured, so as to prevent his estate from indirectly obtaining the benefit of the policy.

The Vice-Chancellor dismissed the bill, and from this decree the plaintiffs appealed (see the report, *ante*, 667).

Rolt Q. C., and *Surrage*, for the plaintiffs, cited *Cook* v. *Black*, 1 Hare, 390.

Giffard Q. C., and *Osborne Morgan*, for the defendants, cited *Godsall* v. *Boldero*, 9 East. 72, 2 Smith Lead. Cas. 204; *Dalby* v. *The East India and London Life Assurance Company*, 15 C. B. 365; *Dufaur* v. *The Professional Life Assurance Company*, 25 Beav. 599.

Knight Bruce L. J.—In this case Mr. Lamb, whose life was assured for two policies in the office of the Solicitors' and General Life Assurance Society, mortgaged the policies and other property fairly, as it seems, and for valuable consideration to Mr. Ridgway, who is not a party to the present cause. The

state of the security and the debt at the time of Lamb's death renders it immaterial as between Lamb and Ridgway how Lamb died. Lamb died by his own hand, but the policies in question as between his estate and Ridgway, and as between the society and Ridgway, were not less effectual than if the clause as to suicide had been omitted from each of them. Accordingly Ridgway, before the filing of the bill, received from the insurance office the full sum payable on the policies, just as if neither of them had contained the clause; and the office does not owe anything on account of these policies, either to Ridgway or to the representatives of Lamb. It may be taken that the property included in the mortgage security, which was not paid off before Lamb's death, was, and is, amply sufficient to pay Mr. Ridgway's security, and leave a surplus for the personal representatives of Lamb, which surplus it is the object of the present suit to obtain from them, in order to indemnify the insurance office against the policies. This demand Lamb's representatives resist, and were thought by Vice-Chancellor Wood justified in so doing; and I think so too. Not any fraud nor collusion is proved to have existed on their part, or on the part of Mr. Ridgway, who is absent from the record. Mr. Ridgway was not affected by the clause against suicide, but, notwithstanding that clause, was entitled to receive, and did receive, previously to this suit, the sums assured by the policies, as if such clause had not existed; and he is entitled to hold for his own use what he so received, a great amount being then due to him on his security. It is true that the representatives of Lamb would not, under any circumstances, have received anything against the office, as Lamb died by his own hand; and it is true that his estate derives benefit to the amount of the policies. This state of things is, however, in my opinion, insufficient in the absence of fraud or collusion, to raise such an equity between the parties as is claimed by the bill. It seems to me that, as between them, matters remain as they were before the institution of the suit. The plaintiffs have not any claim on the surplus which is in Mr. Ridgway's hands, nor any claim on the estate of Mr. Lamb. The clause in the policies does not prohibit Lamb's estate from deriving indirectly any benefit from the policies in the event of his suicide, and the advantage which in the present instance has accrued to the estate, cannot be taken from it. I agree with the Vice-Chancellor that the bill must be dismissed.

Turner L. J., after stating the facts, proceeded as follows:— In support of the appeal, it was first argued that, as between

the appellant and Frederick Lamb, the whole amount of the money ought to be thrown upon the freehold and copyhold estates as far as they would extend, and that, if the policy moneys were applied in part payment of the mortgage, the appelants were entitled to a charge on the freehold and copyhold estates to the extent of the money so applied, the argument resting on the ground that, according to the true meaning of the condition, the assured, having died by his own hand, was not entitled to any benefit from the policy. It does not appear to me that this construction can be maintained. The condition distinguishes between the case in which the assured continues to be the holder of the policy up to the time of his death, and cases in which he has parted with it for value. Payment in the first case is at the discretion of the directors; but, in the second case, there is no such discretion. Looking at the discretion given in the case where the policy has not been assigned, it is unreasonable to suppose that, in the case where the policy has been assigned for value, it was intended that no payment was to be made to the assured, even at the discretion of the directors. In all cases where policies have been assigned, the payment must operate indirectly for the benefit of the assured, as his estate must be exonerated *pro tanto*. If no other property had been included in the mortgage, it is clear that the whole of the money would have been payable, and if this is the case, it is difficult to see how a distinction can be drawn in cases where other property is included in the policy. This construction would contradict the terms of the condition, which are, that the policy is to be valid to the extent of any interest acquired thereon by assignment for value. This argument, therefore, cannot be maintained. Then it was said that there ought to be a contribution, and that the appellants are entitled to a charge to the extent of what has been paid out of the policy moneys. But the office is not in any way in the position of a surety. It is a principal debtor to the extent of whatever was due on the policies; and it has paid no more than what at law and in equity it was bound to pay. There is no distinction in the construction of the contract at law or in equity. The appellant's contention amounts in effect to this, that where a creditor has mortgaged a debt due to him with other property, the original debtor is entitled to contribution. This is clearly not the case. It was then argued on the part of the appellant that to hold the assignee to be entitled to recover would be to put it in the power of the assignee to decide whether the company should or should not be liable. But in this condition the office has held

out to the assured that the policy is to be valid to the extent of the assignment, and it is not competent to the office to raise any question on this ground. The policy being assigned takes effect, as if the policy assigned was the absolute property of the assignee. There is no question between the assignee and the office, and, therefore, no case for contribution. If the appellants wish to obtain contribution in such cases, they must alter the terms of their condition. I must add that nothing which I have said applies to cases where fraud is proved. On the grounds which I have stated I think the decree right, and that the appeal must be dismissed with costs.

DIGEST OF RECENT CASES.[1]

Action.

The prevention of the doing an unauthorized and unlawful act does not constitute a good cause of action, on the part of the incipient wrongdoer, who is interfered with in the commission of his intended offence.

The plaintiffs, a railroad corporation, brought a special action on the case against the defendant, for preventing their constructing a branch track across a public highway, where they were not legally authorized so to construct it. *Held*, that the action was not maintainable; that, if the defendant wrongfully entered upon the land of another to prevent the construction of such branch railway, he would be liable to the owner in an action of trespass therefor; and that he was not liable in case to the railroad corporation for merely preventing their violating the law.

If plaintiffs fail to establish their right as set forth in their writ, they will not be allowed to amend, by making a different

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[1] These abstracts have been taken from the reports of recent English cases in the different periodicals, mainly from the *Weekly Reporter*, an excellent and reliable journal of legal matters, from advance sheets of the official reports, kindly furnished us by the reporters of the various States in which the decisions were rendered, and from reliable legal Journals in this country.

description of their cause of action, so that they may recover nominal damages.—*Bangor, Oldtown and Milford R.R. Co.* v. *Smith*, 49 Me. 9.

As between the drawer and a mere accommodation acceptor of a bill for the benefit of the drawer, such acceptor stands as surety.

In an action upon a promissory note, given by a principal to his surety to indemnify the latter for his liability, the measure of damages is the amount paid by the surety on account of such liability, before the trial, with interest from the time of payment.

An auditor has no power to allow an amendment of the pleadings in an action at law committed to him.

In an action of assumpsit the plaintiff cannot recover upon a promissory note given to him by the defendant, which had not become due at the date of the plaintiff's writ.

Where a specification has been filed under a count for money had and received, the plaintiff is not entitled to recover upon a note substantially varying from his specification.

Under a count for money had and received, the plaintiff cannot recover upon a note made by the defendant, payable to a third person, and not indorsed by the latter, where it does not appear that any money, or anything treated as money, had passed between the plaintiff and the defendant.

Under the general issue, the defendant cannot show a judgment recovered in another State by the plaintiff, upon the same cause of action, since the commencement of the plaintiff's suit here.

Under a count for money had and received, a surety cannot recover of his principal for money paid by the surety on account of his liability for such principal.

An attorney, merely as such, has no authority to indorse for his client a note left with him for collection.—*Child* v. *Eureka Powder Works*, 44 N. H. 354.

Actions for injuries to the person, which die with the person, are not assignable before judgment.

But an action for unliquidated damages, founded either on the entire destruction, or conversion, or partial injury to personal property, which survives, is capable of assignment; and the assignment, when executed in good faith, for adequate consideration, and upon due notice to the defendants, and all parties in interest, will bind the parties thereto, and such as have knowledge thereof.

Such assignment may be by parol agreement; and when fairly executed between attorney and client will not be void, as being champertous, or against public policy.

It is for the jury to determine upon the sufficiency of the assignment and notice; and if the same are good and valid, the law will protect the assignee from any subsequent wrongful settlement by the original parties.—*Jordan* v. *Gillen*, 44 N. H. 424.

An action cannot be maintained under the provisions of the statute, for knowingly aiding a debtor in the fraudulent concealment and transfer of his property, where the transfer, alleged to be fraudulent, is of the right of redeeming property mortgaged to secure debts vastly exceeding its value, and the equity of redemption, therefore, is utterly worthless.—*Veazie* v. *Boynton et al.* 49 Me. 24.

Adverse Occupation.

To make an adverse possessory title by the possession of successive occupants, the possession must be connected and continuous; but such connection and continuity may be effected by any conveyance, agreement or understanding that has for its object a transfer of the possession, and is accompanied by a transfer in fact.

Evidence, therefore, that an agreement for the sale of certain property by an adverse possessor, to one who succeeded him in the possession, embraced the land in question, but that it was omitted by mistake in the drafting of the deed, is admissible, for the purpose of showing the relation of the possession taken to that relinquished.

A record of a judgment is not admissible for any purpose against a person not a party or privy to it, except to prove the fact that such a judgment was rendered.—*Smith et al.* v. *Chapin*, 31 Conn. 530.

Appropriation of Payments.

Where an account consisted in part of charges for liquors sold in violation of law, and there were payments credited on the account, and it had been agreed between the parties that the payments as they were made should be applied first upon the charges for liquors sold, it was held that, though the agreement was void, and though the amount paid for the liquors

could, under the statute, be recovered back in a proper suit, yet, so far as the payments had been already so applied under the agreement, they could not be diverted from that application and applied to the other items of the account.

Where a note was given payable on demand with interest, and two weeks after a mortgage was given to secure it, and it was agreed that the note should lie so long as the payee was satisfied with the security and the interest was paid, and no notice was given or demand made for two years, it was held that the note was not to be regarded, at the end of that period, as overdue, and that an indorsee of it did not take it as dishonored paper.

The time when such a note is to be regarded as overdue, must depend upon the particular circumstances, indicating the intention and understanding of the parties.

And this is properly a question of fact, to be determined by the jury.—*Tomlinson Company* v. *Kinsella*, 31 Conn. 268.

Bills and Notes.

Where a draft, which was drawn on a firm in Philadelphia, was protested for non-acceptance, the certificate of the notary that he had "duly notified the drawer and indorser," (who were citizens of this State,) is, by the law of the State of Pennsylvania, where the draft was payable, evidence of the facts certified by the notary,—and, in the absence of contradictory proof, sufficient to charge the indorser.

In this State, likewise, the notary's certificate is *prima facie* sufficient; but not so conclusive, as to exclude explanatory or contradictory evidence.

In an action against the indorser of the draft, the holder will be entitled to damages at the rate of six per cent. additional to the contents of the bill and interest; for the statutes of 1841 and 1857 are not materially variant; the difference in phraseology was only for the purpose of condensation.—*O. Bank* v. *Wood*, 49 Me. 26.

A promissory note, indorsed by the defendant, was sent by the plaintiff, when about to fall due, to a collecting agent in the place where it was payable. The agent presented it for payment, and on payment being refused, delivered it to a notary for protest. Neither the collecting agent nor the notary had any knowledge of the defendant's residence. The plaintiff had knowledge of it, but had not communicated the information.

The agent and the notary used due diligence to ascertain it, and were led to believe that it was in *M*, and sent a notice to the defendant there. The defendant in fact resided in *N*, and never received the notice. Held, that the notice was sufficient.

The "due diligence" in such a case is to be exercised by the holder for collection, and not by the owner of the paper.

It is otherwise where the person acting in the collection of the note is the mere servant of the owner.

Collecting agents are recognized in the law as "holders for collection," and for all the purposes of demand and notice, and the exercise of due diligence after dishonor, they are holders of the note; and the law imposes upon them the duty of doing all that the owner would be required to do for the protection of his rights, and makes them liable over to the owner for default in that duty.

The holder of indorsed paper has a right to rely on the contract of the indorser that the paper will be paid by the maker at maturity, and he is not bound to anticipate and make provision for a breach of the contract.

The duty to give notice, and therefore the duty of due diligence to discover the residence of the indorser, arising subsequently to the dishonor of the note, it is not an element of due diligence that the owner should previously have communicated his knowledge of the indorser's residence to the holder for collection.

If any precaution against mistake is to be exercised before dishonor, it should be by the indorser himself, by appending to his indorsement the name of his residence; and if he neglects this, he may rightfully be presumed to be willing to leave the matter of notice to the contingencies of due diligence.—*Bartlett* v. *Isbell*, 31 Conn. 296.

Covenant.

The defendant who derived title under a deed from the sheriff, executed in pursuance of a judgment of foreclosure of a mortgage and a sale thereunder to the defendant. After the conveyance to Mrs. Clark (plaintiff's intestate), upon the application of the holder of a prior mortgage, the sale under the judgment was set aside, and the judgment opened. Subsequently, a prior mortgage was foreclosed, Mrs. Clark being a party defendant in the action, and the premises again sold, and Mrs. Clark lost the property. An appeal was taken from the order setting aside the sale to the Court of Appeals, which is

still pending. It was claimed that the order setting aside the sale and opening the judgment, operated as a *disseizin* of the defendant's title, and worked a breach of his covenant of *seizin*.

Held, that there had been no breach of the covenant of *seizin*.—*Court Adm.* v. *McReynolds*, Super. Ct. N. Y., April, 1864.

Criminal Law.

A delivery of horses to a horse-dealer, for sale, the proceeds to be returned to the owner, is not a bailment.

Therefore the 108th section of the Act of 1860, providing that "if any person being a bailee of any property, shall fraudulently take or convert the same to his own use or to the use of any other person, except the owner thereof, although he shall not break bulk or otherwise determine the bailment, he shall be guilty of larceny and punished, as is provided in cases of larceny of like property," does not apply to such a case.

A count commingling two separate and distinct offences, the one felony and the other a misdemeanor, is bad.

A count charging misdemeanor, where all the other numerous counts charge felony, is bad; except in certain cases, ex necessitate, where one offence is the result of, or so intimately connected with the other as to render it impossible to ascertain of which offence defendant may be guilty, until the evidence be heard.—*Commonwealth* v. *Wm. Cart*, *Sup. Ct. of Penn.*

If a man, without aiming at any one in particular, fires a pistol into a group of persons, intending generally to do grievous bodily harm, and severely wounds one of the persons in the group, he is guilty of felony, and may be indicted for feloniously shooting at the person wounded, with intent to do grievous bodily harm to him.—*Reg.* v. *John Fritwell*, Crown Cas. Res. April, 30.

Deeds.

Where a deed is delivered to a third person for the grantee, neither the presence of the grantee, nor his previous authority, nor his subsequent express assent, is necessary to make the delivery valid. Where the deed is beneficial to him, his assent will be presumed in the absence of proof of his dissent.

The principle which makes the retention of possession of

personal chattels by a vendor a badge of fraud, does not apply to the retention of possession of real estate by a grantor.

An agreement made in good faith that a grantee shall furnish a certain sum of money to pay the grantor's debts, that the grantor shall remain in possession and have the use of the property for his support, and that if it be not sufficient the grantee shall make up the deficiency, is a lawful contract, and the law infers no fraud from it. The question as to the fraudulent character of such an arrangement is wholly one of fact.

Where a grantor had conveyed his real estate under such an agreement, and was in possession, and a creditor had levied on the land and brought ejectment against the grantor and the grantee, it was held that the declarations of the grantor previous to the making of the conveyance, as to his fraudulent intent in making it, were admissible against him, but not against the grantee, unless there was proof of his connection with the fraudulent intent.—*Tibbals et al.* v. *Jacobs et al.* 31 Conn. 428.

Disclaimer.

By the rules of pleading, in a real action the defendant admits himself to be in possession of all the land demanded, if he files no disclaimer of the whole or any part of it.

The statute of 1849, c. 105, provides that the certificate of the register of deeds shall be *prima facie* evidence of a public notice, by a mortgagee, of his claim to foreclose a mortgage, published "in a public *newspaper* printed *in* the county where the premises are situated;" but a certificate of the register, that a (recorded) notice "was copied from the Bangor *Journal*, Vol. 1," &c., does not inform the court, judicially, that the *Journal* "was a *newspaper* printed in the county," &c., and, without other evidence, there is no sufficient proof of notice.—*Blake* v. *Dennett*, 49 Me. 102.

Husband and Wife.

A husband may in equity make a valid gift of personal property to his wife, where the rights of creditors do not interfere.

But clear evidence of the intention of the husband to make such gift will be required.

Where the only evidence of such intention was the fact that a bill of sale of furniture purchased was made out to her at the

time of the purchase, but it was not shown that it was done by his direction, or even with his knowledge, it was held that the intention was not sufficiently established.

Where, however, certain personal property was distributed to the wife, which vested by law in the husband, and the husband allowed her to sell it and invest the proceeds in her own name in bank stock, did not receive the dividends during her life, and after her death as her administrator sold the stock and deposited the proceeds in the savings bank to the credit of her estate, it was held to be satisfactory proof of his intent to give her the property and its proceeds.

The act of 1850, (Comp. stat. 1854, p. 377,) provides that where the real estate of a married woman is sold, and the avails are "secured or invested in her name," the same shall in equity belong to her. Where a note was taken in the name of the wife for the price of her land sold, it was held that the avails of the sale were *secured and invested* in her name within the meaning of the statute.

Where money received by the wife for her real estate sold, was deposited by her in her own name in bank, it was held to be *invested* within the meaning of the statute.

If the money so deposited could not be regarded as invested, it would be considered as still in the possession of the wife, deposited for safe keeping to await an investment.

Where certain railroad bonds were taken in the name of the wife for her real estate sold, and after the wife's death the husband received the interest upon them, it was held that the bonds belonged to her estate, and that the estate of the husband was liable to her representatives for the interest so received.

Where a note had been given, payable to the wife for the price of her land sold, and afterwards the maker had done work on buildings belonging to the wife, under an agreement with herself and her husband that his bill of work should be indorsed on the note as part payment of it, which however was not done, and the note was kept by the husband until his death, and was always claimed by him, it was held that the note was the property of the wife, but that the bill of work ought to be applied in part payment of it.—*Jennings, Exec.* v. *Davis, Adm.* 31 Conn. 134.

Impairing Obligation of Contracts, Notes and Bills.

The provision of the Constitution of the United States against laws impairing the obligations of contracts, applies only to laws

designed to operate upon some of the stipulations of contracts, and was not intended to interfere in any manner with the legislation of the States in relation to their internal police.

The allowance of days of grace upon negotiable notes being founded wholly upon custom, the custom is to be regarded as contemplating the state of things, affecting the days of grace, which may happen to exist when the note falls due.

A negotiable note was made and indorsed on the 29th day of June, 1860, payable at bank in six months; the last day of grace falling on the 1st day of January, 1861. By statute, if the last day of grace on a negotiable note should fall on any one of certain public holidays, the note was to be payable on the first secular day preceding. On the 6th day of June, 1860, the legislature passed an act making the 1st day of January a legal holiday under the statute, which act took effect, by a general law, on the 4th day of July following. *Held*, that the act operated upon the rights of the parties under the note, and that payment could be legally demanded, and the note protested on the 31st day of December.—*Barlow et al.* v. *Gregory*, 31 Conn. 261.

Injunction.

The sale of the good-will of a business will take from the seller the right to continue, or in any way hold himself out as continuing the identical business, the good-will of which he has sold; but it will not necessarily prevent him from engaging in a similar business, which is not in fact and does not purport to be a continuation of that of which he has sold the good-will.

Where the defendant had sold a newspaper published by him in D., and its subscription list, and also a printing establishment, carried on there by him in connection with the newspaper, "with the good-will belonging and appertaining to the same";—*Held*, that this sale did not deprive him of the right to establish in D. a new and different newspaper, and in connection therewith a new printing office, where such new printing office and newspaper were not in fact, and did not purport to be a continuation of the printing establishment or newspaper sold, and where the business of the new office and journal was not in fact, and did not purport to be, a continuation of the business, the good-will of which the defendant had sold.

The plaintiffs having bought from the defendant an established business, with the good-will belonging to it, and received a bill of sale thereof, brought a bill in equity against the vendor to

restrain him from carrying on a similar business;—*Held*, that parol evidence was inadmissible to vary the written contract of sale, by showing that at the time of the sale, or during the negotiations therefor, the vendor made a verbal agreement that he would not set up a competing business.

Where, by written articles between the plaintiffs and the defendant, the former agreed to purchase and the latter to sell a certain newspaper and printing establishment, with the good-will belonging thereto, for a sum to be fixed by the appraisal of A, B and C; and A, B and C, by virtue of this agreement, and without any further authority, made the appraisal upon the supposition that the defendant was to be excluded from any competing business; and thereupon the sum fixed by them was paid by the plaintiffs to the defendant, who gave to the plaintiffs a bill of sale of the newspaper and printing establishment, with the good-will belonging thereto; and it did not appear that the defendant knew that the appraisal was made upon such a supposition;—*Held*, that the defendant was not estopped to assert a right on his part to set up a competing business.

A usage, to be admissible to explain the intent of parties in a contract, must be so well settled, so uniformly acted upon, and of such long continuance, as to raise a fair presumption that it was known to both contracting parties, and that they contracted in reference to and conformity with it.—*Smith* v. *Gibbs*, 44 N. H. 334.

Insurance.

A effected upon his own life a policy of assurance, which contained a provision that if the assured should die by his own hand, the policy should become void, except to the extent of any interest acquired therein by assignment for valuable consideration.

A mortgaged the policy, together with other property, to B, as a security for an advance far exceeding the amount secured by the policy, and afterwards committed suicide. The whole amount secured by the policy was paid (without prejudice,) to B, by the society, with the consent of C, the personal representative of A.

Held, that the inclusion of other property, together with the policy in the mortgage to B, did not entitle the company as against A's personal representative, to have the securities apportioned, so as, after satisfaction of B's mortgage debt, to recoup themselves out of A's estate the amount already paid by them

upon the policy.—*The Solicitors and General Life Assurance Society* v. *Lamb*, *V. C. Welch's Court*, March 18.

The secretary of the P. Assurance Company offered the R. Company a share of the risk on a policy, stating that his own company would retain a portion of the risk. The R. Company accepted the offer, and subsequently the P. Company, without notice to the R. Company, assigned the remaining portion of the risk.

Held, that the reassurance policy was vitiated.—*Traill* v. *Baring*, *V. C. Stuart's Court*, January 13.

Mortgage.

A promissory note given by A to B, and by B indorsed to a third party, constitutes a contingent indebtedness from A to B, so long as B's liability continues thereon.

A question of fact submitted to the court, and decided by the judge, acting in place of a jury, is not open to revision or exceptions.

The grantee, in a second mortgage of chattels, may maintain an action of *trover* against an officer, who, before the title of the first mortgagee becomes absolute, attaches and sells the goods mortgaged, such grantee being, by the act of the officer, deprived of his right of redemption.

The right of the grantee, in the second mortgage, to redeem the goods, continues until the foreclosure of the first mortgage, unless defeated by the goods being taken and sold by a third party.

An appraisal of goods of a mortgagor, attached by his creditors, made under the authority of the attaching officer, is not binding on the mortgagee as a rule of damages, in an action against the officer.—*Treat et al.* v. *Gilmore*, 49 Me. 34.

A mortgagee, who had taken possession for the purpose of foreclosure, but, before the foreclosure was perfected, quitclaimed his right, had not such a seizin as will entitle his widow to dower in the mortgaged estate, notwithstanding the latter became absolute in his grantee, by the failure of the mortgagor to redeem.

Although the tenant claims title under the deed of the mortgagee, in an action by his widow for dower, he will not be estopped from showing that her husband's seizin was only that of a mortgagee.—*Foster* v. *Dwinel*, 49 Me. 44.

The defendant signed a note for $60 with one L, as surety, and took from L a mortgage of real estate to indemnify him against that liability. The defendant had the note to pay, and L sold the mortgaged premises to M. The defendant sued M on the mortgage, and after a large bill of costs ($135) had accumulated, recovered judgment against M, and took his writ of possession in common form, containing an execution for costs against M, and was put in possession of the mortgaged premises, but no costs had been collected of M. Before judgment, M had conveyed the premises to these plaintiffs;—*Held*, that the plaintiffs were not entitled to a decree of discharge of the mortgage until they had paid or tendered, not only the note and interest originally paid by the defendant, but his costs in the suit on the mortgage.—*Emerson* v. *Gilman*, 44 N. H. 235.

Where a mortgage is given to secure future advances or liabilities, and the mortgagee has definitely agreed to make such advances or to assume such liabilities, the mortgage when recorded is a valid and fixed security, not affected by a subsequent mortgage of the same property, though the advances may be made or the liabilities assumed after the record of such later mortgage.

Where, however, it is optional with the mortgagee to make the advances or not, and he has actual notice of a later mortgage upon the same property for an existing debt or liability, such later mortgage will take precedence of the prior one as to all advances made after notice of such later mortgage.

Whether the record of the later mortgage would not be sufficient notice to the prior mortgagee; and whether a mortgage to secure future advances, to be made or not at the option of the mortgagee, should not stand in all respects as if it was executed at the time the advances are in fact made: *Quære.*

And it makes no difference that such later mortgage is given to secure future advances to be made or not at the option of the mortgagee, so long as the advances under it are actually made before the advances under the prior mortgage over which they claim precedence. [Butler J., dissenting.]

A knowledge of the existence of the later mortgage is enough to affect the prior mortgagee, as to his future advances, even though he be not notified of the advances actually made under the later mortgage.

In a suit for a foreclosure brought by the prior mortgagee, against the mortgagor and subsequent mortgagees, the bill alleged that the petitioner indorsed a note of a certain date and

amount for the mortgagor, under the mortgage, but contained no allegation that the note was a renewal of a formal one. *Held*, that evidence to prove the note to have been given in renewal of a former note was inadmissible.

Where a mortgage has been given to indemnify an accommodation indorser of a note, and the note at maturity is not paid, but renewed, with a renewal of the indorsement, the security applies to the renewal note in the same manner as to the original one. So long as the renewal note is not paid, the indorser is not indemnified for his original indorsement.—*Boswell* v. *Goodwin et al.* 31 Conn. 81.

Necessaries.

A female infant was seduced and got with child, under a promise of marriage. The seducer afterwards refused to marry her, and she was left in a state of destitution and suffering. In these circumstances she applied to an attorney to bring suit for her for the breach of the promise of marriage, the seducer being a man of considerable property. The attorney brought the suit, which was afterwards settled by the marriage of the parties. After the marriage the attorney sued the husband and wife for his fees. The court charged the jury that if the services were absolutely requisite for the personal relief, protection and support of the minor, she could contract for them, and the defendants were liable. Held, on motion of the defendants for a new trial, that the charge was correct.

In cases where, under peculiar circumstances, a civil suit is the only means by which an infant can procure the absolute necessaries which he requires, it would be a reproach to the law to deny him the power to make the necessary contracts for its commencement and prosecution.

There is no reason why the power of an infant to contract for necessaries should not be governed by the same general principles which determine the power of a married woman, abandoned by her husband, to procure necessaries; and it is well settled that her power extends to legal proceedings necessary to her personal security.—*Munson* v. *Washband and Wife*, 31 Conn. 303.

Parent and Child.

A father may, by agreement with his minor child, relinquish to the child the right he has to his services and earnings.

After such an agreement the father may contract to employ and pay his child for his services, and he will be bound like a stranger.

But no such contract will be presumed. Evidence of an express contract will ordinarily be required.—*Hall* v. *Hall*, 44 N. H. 293.

Probate Courts.

Independent of the statute provisions, the court of probate has power to revoke letters testamentary, or letters of administration, where they have been issued without jurisdiction; where they have been irregularly or illegally issued; or where they have been issued for a special cause which no longer exists.

Where the proper bond is not given by an executor, the administration is suspended; and the claims of creditors are not barred by neglect to present them, or to commence suits upon them while the suspension continues.

Where a residuary legacy is, in terms, of personal property only, and it appears that there is no other property undisposed of, a bond may be given to pay debts and legacies.

The court may receive evidence of the condition of the estate, in order to determine if a legacy is residuary.—*Morgan* v. *Dodge*, 44 N. H. 255.

Partnership.

Where the plaintiffs and the defendant contracted with another in writing, under seal, to erect certain buildings;—*Held*, that as between themselves the agreement is not conclusive that they were joint contractors; but that the plaintiffs may show by parol that they were only sureties.

An action at law will lie by one partner against another to recover an amount found due on an accounting between them, and which the defendant has promised to pay.

The mere fact that the jury had separated at the adjournment, after rendering their verdict, will not vitiate it; although at the coming in of the court the papers were again committed to them, and the verdict modified, unless there be some evidence of abuse.—*Nims* v. *Bigelow*, 44 N. H. 376.

Where two parties entered into a written contract to cut certain timber, one to furnish money, teams and supplies, and the other his own services, and the latter to have one-fourth of the profits, and the former three-fourths, besides stumpage and interest on his advances, this did not constitute a co-partnership, if one of the parties had not, by the terms of the contract, an unqualified right to dispose of his own share of the lumber, nor any right to dispose of the remainder on any terms whatever. Appleton J., *dissenting*.—*Braley* v. *Goddard*, 49 Me. 115.

A partnership with all its incidents may be created without articles in writing.

Real estate purchased by partners, with partnership funds, for partnership purposes, though conveyed to them by such a deed, as, in case of other parties, would make them tenants in common, is considered, in equity, as part of the partnership stock, to be applied, if necessary, to the payment of partnership debts, including the balance due any partner on final settlement.—*Buffum* v. *Buffum*, 49 Me. 106.

Real or Personal Estate.

Trees and shrubs planted in a nursery for the temporary purpose of cultivation and growth, until they shall become sufficiently mature to be fit for market, and to be then taken up and sold, pass by a mortgage of the land on which they are planted, so that the mortgagor or his assignees cannot remove them as personal chattels.—*Maples* v. *Millon et al.* 31 Conn. 598.

Money due for rent, which accrued prior to a testator's death, goes to his executor as part of the estate; but rent afterwards accruing, if the estate be solvent, belongs to the heirs or devizee.

And the executor has no claim to after accruing rent, so that he may collect it, to reimburse himself for payments made to a co-tenant of the rented premises, for his share of the rent collected by the testator; the co-tenant's claim creating no lien on this particular portion of the testator's estate.—*Mills* v. *Merryman et ux.* 49 Me. 65.

Trust and Trustees.

One who holds property in trust cannot be the purchaser thereof at a sale by operation of law.

Shares of stock in an incorporated company were conveyed by the plaintiff to the defendant as collateral security for a debt, which was afterwards paid. The shares, while yet standing in the defendant's name, were assessed by virtue of an act of the legislature, and, for non-payment of the assessment, were sold at auction, and struck off to the defendant;—*Held*, 1st, that the sale was invalid; 2d, that the defendant was liable in trover for the value of the shares at the time of the alleged sale, and the dividends he had received thereon, and interest, deducting the amount of the assessments and expenses of sale.—*Freeman* v. *Harwood*, 49 Me. 195.